To Be Argued By:
Christopher G. Oprison
(of the bar of the State of Florida,
State of Texas, State of Virginia
and District of Columbia)
by permission of the court
Time Requested: 15 Minutes

New York County Clerk's Criminal Indictment No. 773/14

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

against

JOEL SANDERS,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

CHRISTOPHER G. OPRISON
(of the bar of the State of Florida,
State of Texas, State of Virginia
and District of Columbia)
by permission of the court
DLA PIPER US LLP
200 South Biscayne Boulevard
Suite 2500
Miami, Florida 33131
305-423-8500
chris.oprison@dlapiper.com

JESSICA MASELLA
DLA PIPER US LLP
1251 Avenue of the Americas
27th Floor
New York, New York 10020
212-335-4556
jessica.masella@dlapiper.com

Attorneys for Defendant-Appellant

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QUESTIONS PRESENTED

I. Did the trial court's legally impossible jury instructions relating to the charges of Scheme to Defraud and Conspiracy constitute a structural defect in the trial framework, specifically, in the jury deliberations over whether the prosecution has or could satisfy its burden of proof, necessitating automatic reversal of Sanders' conviction?

II. Did the trial court violate Sanders' constitutional double jeopardy protections when it allowed the prosecution to introduce evidence of acquitted conduct relating to the Falsifying Business Records and Grand Larceny counts?

III. Did the trial court err when it denied Sanders' Motion to Dismiss the Scheme to Defraud, Martin Act violation, and Conspiracy counts for insufficient evidence *prior to Trial 2* following acquittals and dismissals of the Falsifying Business Records and Grand Larceny counts?

IV. Did the trial court deprive Sanders his constitutional right to a fair trial and to a fair and impartial jury when it permitted the prosecution to introduce evidence of uncharged misconduct that was overly prejudicial, inflammatory, and not probative of any alleged crime charged in violation of *People v. Molineux*[1]?

V. Did the trial court deprive Sanders his constitutional right to a fair trial when it permitted the prosecution to make improper and highly prejudicial comments to the jury about Sanders' decision to not testify at trial, to denigrate the defense theory and attack defense counsel, to engage in improper vouching for prosecution witnesses, and to inject personal beliefs regarding the evidence during closing summation?

VI. Did the trial court violate Sanders' constitutional right to a fair trial when it refused to compel the former Dewey & LeBoeuf Chairman, Steve Davis, to appear at trial, denied defense requests to introduce evidence of Davis' Deferred Prosecution Agreement or to question other witnesses about it, and denied requests for appropriate jury instructions, including a "missing witness" instruction?

[1] 168 N.Y. 264 (1901).

VII. Did the prosecution violate Sanders' due process rights by failing under *People v. Rosario*[2] and C.P.L. § 240.45(1)(A) to disclose witness interview statements, and by failing under *Brady v. Maryland*[3] and *Giglio v. United States*[4] to disclose exculpatory evidence, including inconsistent witness statements and other impeachment evidence?

VIII. Did the trial court err when it permitted the prosecution to present testimony on an ultimate issue of fact through non-qualified lay witnesses, which usurped the jury's fact-finding province, and when it submitted a question of complex federal tax law compliance to the jury?

IX. Were Sanders' convictions supported by legally sufficient *competent* evidence and was the jury's verdict against the weight of *competent* evidence?

X. Did the trial court deprive Sanders his constitutional right to a fair trial and to a fair and impartial jury when it refused to excuse a biased juror or declare a mistrial after the juror, during deliberations, disregarded the trial court's instructions and communicated about the case with a sitting New York criminal court justice, and when the trial court thereafter conducted an ineffective inquiry under *People v. Buford*[5]?

XI. Did the trial court's errors cumulatively deprive Sanders his right to a fair trial?

XII. Did the failure of Sanders' trial counsel to seek a trial severance from co-defendant Stephen DiCarmine deprive Sanders' effective assistance of counsel?

XIII. Did the trial court err when it denied Sanders' Motion to Vacate Conviction based on the recantation of key prosecution witness Frank

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[2] 9 N.Y.2d 286 (1961).

[3] 373 U.S. 83 (1963).

[4] 405 U.S. 150 (1972).

[5] 69 N.Y.2d 290 (1987).

Canellas, which constituted newly discovered evidence that supported Sanders' claim of actual innocence?

XIV. Did the trial court err when it denied Sanders' Motion to Renew his Motion to Dismiss the untimely Martin Act violation count and, as a result of prejudicial spillover, the remaining counts in the Indictment?

PRELIMINARY STATEMENT

In October 2007, the law firms of Dewey Ballantine and LeBoeuf Lamb Greene & MacRae merged to form Dewey & LeBoeuf LLP ("Dewey" or "the Firm"). As a result of the merger, Dewey became one of the largest law firms in the world, with 26 offices, 3000 employees, 1000 attorneys and annual gross receipts of almost $1 billion. The management of the newly-formed Firm was headed by Steven Davis ("Davis"), the Firm's Chairman and member of the Executive Committee, and Stephen DiCarmine ("DiCarmine"), the Firm's Executive Director. Davis was assisted by several other key employees, including Sanders, who served as Chief Financial Officer. During all relevant times, Francis (Frank) Canellas ("Canellas") served as the Firm's Director of Finance.

Following a nationwide economic downturn, departure of a lucrative practice, loss of an increasing number of Dewey partners, and the breakdown of merger negotiations with another international law firm after the prosecution leaked the investigation to the press, *see* A.1300-01, Dewey was forced to file for bankruptcy in or about May 2012. The prosecution's investigation continued, ensnaring lower level Dewey employees with fear and intimidation. Then, in March 2014, the prosecution charged Sanders and his co-defendants in a 106-count Indictment. Sanders was accused of committing grand larceny related to a $100 million revolving credit facility and $150 million private placement of securities. He was

further charged with securities fraud under the Martin Act, falsifying business records by making improper accounting adjustments and reversing disbursement write-offs to maximum revenue and minimize expenses (and doing so in order to meet the asset coverage ratio covenants), and engaging in a scheme to defraud banks and investing insurance companies which had extended term and revolving credit to Dewey or had invested in Dewey's private placement. Sanders was also charged in a criminal conspiracy to carry out the charged grand larceny and falsification of business records. Sanders and his co-defendants were alleged to have defrauded Dewey's creditors by misrepresenting the Firm's financial health by means of fraudulent application of multiple accounting conventions, ultimately causing the Firm's demise in 2012 and its bankruptcy.

At the first trial ("Trial 1"), the prosecution called dozens of witnesses, including former Dewey employees-turned "cooperating" witnesses: Canellas; Thomas Mullikin ("Mullikin"); David Rodriguez ("D. Rodriguez"); Ilya Alter ("Alter"); Dianne Cascino ("Cascino"); Victoria Harrington ("Harrington"); and Lourdes Rodriguez ("L. Rodriguez"). All were shown to be not credible and the prosecution failed to establish Sanders' involvement in or knowledge of any of the charged conduct. The jury rejected the prosecution's theory of liability and evidence at Trial 1, acquitted Sanders of 14 counts of falsifying business records and deadlocked on all other charges. The prosecution thereafter dismissed all remaining

FBR counts in recognition of the dearth of evidence to prove its case. Sanders was later acquitted of all 15 Grand Larceny counts when the trial court dismissed those counts with prejudice after finding the prosecution could not prove beyond a reasonable doubt that Sanders had the requisite criminal intent.

The Scheme to Defraud (Count 1), Martin Act violation (Count 105) and Conspiracy (Count 106) were the only charges remaining for the second trial ("Trial 2"). Trial 2 was replete with erroneous trial court rulings and prosecutorial misconduct that virtually guaranteed Sanders' conviction and denied him a fair trial in violation of his state and federal constitutional rights. Based on the prosecution's drafting of its Indictment, the acquitted Grand Larceny and Falsifying Business Records counts not only formed the predicate acts of the remaining counts but were essential elements thereof. The trial court's admission of evidence of this acquitted conduct at Trial 2 led it to render a legally impossible jury charge and the mere introduction of such evidence violated Sanders' double jeopardy protections. The trial court further erred when it permitted the prosecution to introduce inflammatory evidence of uncharged misconduct, permitted the prosecution to comment on Sanders' decision to not testify at trial and to vouch for the credibility of its own witnesses. The trial court further deprived Sanders his right to a fair trial when it enabled the prosecution to impede Sanders' ability to call a material witness. The trial court violated Sanders' due process rights by not compelling the prosecution to

produce all *Rosario*, *Brady* and *Giglio* evidence, permitted the prosecution to introduce wholly improper evidence to the trier of fact and refused to declare a mistrial in the face of blatant juror misconduct.

Each error standing alone was sufficient to infect Trial 2 and deprive Sanders a fair trial. Cumulatively, there should be no doubt that the manner in which Trial 2 was conducted violated Sanders' constitutional rights. In addition to challenging Sanders' underlying convictions, Sanders also appeals the trial court's erroneous denial of two post-trial motions, which this Court certified for appeal, including a challenge to the conviction on grounds that the prosecution's indispensable witness—Canellas—recanted his testimony, and on grounds that a subsequent ruling from the New York Court of Appeals rendered the Martin Act charge untimely. As detailed below, Sanders' convictions must be reversed, vacated and the charging instrument dismissed with prejudice.

PROCEDURAL BACKGROUND

A. Trial 1: Acquittals, Deadlocks, Dismissals, and Davis' DPA.

In March 2014, the prosecution charged Sanders with (1) 1 count of scheme to defraud in the first degree in violation of Penal Law § 190.65(1)(b) ("Scheme to Defraud") (Count 1); (2) 15 counts of grand larceny in the first degree in violation of Penal Law § 155.42 ("Grand Larceny") (Counts 2-16); (3) 88 counts of falsifying business records in the first degree in violation of Penal Law § 175.10 ("Falsifying

Business Records" or "FBR") (Counts 17-104); (4) 1 count of securities fraud in violation of N.Y. General Business Law § 352(c)(5) (the "Martin Act violation") (Count 105); and (5) 1 count of conspiracy in the fifth degree in violation of Penal Law § 105.01(1) ("Conspiracy") (Count 106). A.39-97. Sanders was the only defendant charged with all 106 counts in the Indictment.

Trial 1 commenced on May 26, 2015. Sanders was tried jointly with Davis and DiCarmine. At various points throughout Trial 1, the prosecution voluntarily dismissed 53 FBR counts for insufficiency of evidence, including 47 counts on September 10, 2015 immediately prior to its closing argument. On October 7, 2015, the jury acquitted Sanders of 13 of the remaining FBR counts, *see* A.1025, and on October 13, 2015, acquitted Sanders of 1 additional FBR count, *see* A.1026. On October 19, 2015, the jury declared it was "hopelessly deadlocked." A.1027. The trial judge granted a mistrial on all remaining counts. *See* A.1028.

On December 7, 2015, the prosecution dismissed all remaining FBR counts. A.1040. On January 6, 2016, the prosecution deferred Davis' prosecution for a period of 60 months. A.1510-1514. On February 26, 2016, the trial court dismissed all 15 Grand Larceny counts (Counts 2-16) on which the jury had deadlocked at trial. A.1043. The trial court expressly found that no rational juror could find that Sanders or his co-defendants acted with requisite criminal intent. The trial court declined to dismiss the remaining charges. A.1043.

B. Trial 2: Sanders' Conviction, Sentence and Post-Trial Motions.

Trial 2 commenced on February 7, 2017 on only the Scheme to Defraud, Martin Act violation and Conspiracy counts. Sanders was tried jointly with DiCarmine. No severance motion was filed by Sanders' counsel. On May 8, 2017, the jury acquitted DiCarmine, but convicted Sanders, of all charges. A.1416.9-1416.13. In September 2017, Canellas recanted his testimony and admitted that neither Sanders nor anyone else had the criminal intent to carry out any of the charged conduct. A.288-92. On October 10, 2017, Sanders was sentenced to a conditional discharge for a period of three-years, including a $1 million fine and 750 hours of community service. A.23. On November 7, 2017, Sanders filed a Notice of Appeal from his judgment of conviction and sentence. A.2.

On November 8, 2017, Sanders filed a Motion to Vacate Conviction under C.P.L. § 440.10 due to Canellas' post-trial recantation. A.292.1-292.2. The trial court denied the Motion on March 16, 2018. A.28-34. On April 12, 2018, Sanders sought leave to appeal the trial court's order denying Sanders' § 440.10 motion to vacate. A.24.1. On June 19, 2018, this Court certified the issue, granted Sanders leave to appeal, and consolidated the Canellas recantation appeal with Sanders' appeal of the underlying conviction. A.35.

On September 24, 2018, Sanders moved to renew his prior motion for a trial order of dismissal at Trial 2, under C.P.L.R. § 2221 based on a decision rendered

June 12, 2018 by the New York Court of Appeals in *People v. Credit Suisse Secs. (USA), LLC*, 31 N.Y. 3d 622 (2018) holding that Martin Act enforcement actions are subject to a 3-year statute of limitations. A.746.3-746.9. The trial court denied relief on November 15, 2018. A.746.5. On December 3, 2018, Sanders sought leave to appeal the trial court's denial of relief, A.746.3, which was granted on January 22, 2019. A.746.9. The Martin Act statute of limitations appeal was consolidated with the other pending appeals. Sanders filed his notice of appeal on January 24, 2019.

FACTUAL BACKGROUND

To avoid repetition, the relevant factual background is set forth below in connection with each Issue presented to which the facts pertain.[6]

ARGUMENT

I. THE TRIAL COURT'S LEGALLY IMPOSSIBLE JURY INSTRUCTIONS CONSTITUTED STRUCTURAL DEFECTS IN THE TRIAL FRAMEWORK.

The trial court's jury charge on the Scheme to Defraud and Conspiracy counts were not only erroneous, but legally impossible. The trial court permitted the prosecution to introduce and rely upon acquitted Grand Larceny and FBR conduct at Trial 2 to prove elements of the Scheme to Defraud and Conspiracy counts. In charging the jury as it did, the trial court misguided the jury in the framework of its

[6] Facts set forth in support of one Issue are incorporated by reference into all other Issues to the extent relevant and necessary for full consideration of the Issues herein.

deliberations and as to its role as finder of fact by providing a legally impossible jury charge. Because the trial court's errors amount to structural defects in the trial, Sanders is entitled to automatic reversal of his convictions irrespective of any harmless error analysis.

A. The Structural Error Doctrine.

The Supreme Court has long recognized a limited class of fundamental constitutional errors that "defy analysis by 'harmless error' standards." *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). "Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, 'affect substantial rights') without regard to their effect on the outcome." *Neder v. United States*, 527 U.S. 1, 7 (1999). "Those cases . . . contain a 'defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" *Id.* at 8-9 (quoting *Fulminante*, 499 U.S. at 310). Such errors are said to "infect the entire trial process" and "necessarily render a trial fundamentally unfair." *Id.* (internal quotations omitted). In other words, "these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair." *Id.* (internal quotations omitted).

The purpose of the structural error doctrine, then, "is to ensure insistence on certain constitutional guarantees that should define the framework of any criminal

trial." *Weaver v. United States*, 137 S. Ct. 1899, 1907 (2017). Structural error can arise where (1) the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest, (2) the effects of the error are too difficult to measure, or (3) the error results in fundamental unfairness, such as where a court fails to properly charge the jury on reasonable doubt. *Id.* at 1908. These factors are not mutually exclusive.

Denial of the right to have a jury render a verdict based on a finding beyond a reasonable doubt on all elements of a charge amounts to a structural error, as the jury guarantee is a "'basic protection' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Sullivan v. Louisiana*, 508 U.S. 275, 281 (1993) (quoting *Rose v. Clark*, 478 U.S. 570, 577 (1986)). A court's erroneous jury instructions regarding the elements of a crime, which may misdirect the jury in the discharge of its duties, may constitute a structural defect in the trial process. *See Sullivan*, 508 U.S. at 281. Indeed, an "instructional error [that] consists of a misdescription of the burden of proof . . . vitiates *all* the jury's findings." *Id.* (emphasis in original); *see also People v. Facey*, 127 A.D.3d, 1256, 1257 (3d Dep't 2015) (improper supplemental jury instruction on the prosecution's burden of proof effectively shifted burden to the defendant to prove his own innocence and amounted to structural error compelling reversal of the conviction); *People v. Garcia*, 255 A.D.2d 266, 268-69 (1st Dep't 1998) (trial

court's erroneous jury charge on the proper standard for mental culpability amounted to fundamental error compelling reversal).

As detailed below, Sanders was acquitted of certain FBR conduct and all Grand Larceny conduct. The standalone acquitted conduct also constituted essential elements of the remaining charges of Scheme to Defraud and Conspiracy. To prove those remaining charges, each element must be proven beyond a reasonable doubt. The conduct constituting the elements of Scheme to Defraud and Conspiracy is conduct the jury and judge determined, *conclusively*, was not, and could not be, proven beyond a reasonable doubt. Instructing the jury, then, that its role as finder of fact required it to determine whether the prosecution had satisfied its burden of proving each and every element of each and every count beyond a reasonable doubt is a legally impossible charge. The trial court's erroneous instructions resulted in a misdirection of the jury and amounted to a structural defect in the trial framework requiring automatic reversal of Sanders' convictions.

B. Sanders Was Acquitted of 14 Specific Falsifying Business Records Counts and All 15 Grand Larceny Counts at Trial 1.

At the close of the prosecution's case at Trial 1, Sanders moved for a trial order of dismissal for insufficient evidence. A.921-41. The trial court reserved ruling on the motion, A.942, and charged the jury, A.1005, 1007-17. On October 7, 2015, the jury acquitted Sanders of 13 FBR counts, *see* A.1025, and on October 13, 2015, acquitted Sanders of 1 additional FBR count, *see* A.1026. In total, Sanders

was acquitted of 14 FBR counts, including: (1) Counts 21, 34, 49 and 69 alleging accounting fraud relating to the use of a Dewey corporate American Express card in Sanders' name (the "Joel's Amex"); (2) Counts 51, 52, 53 and 57 alleging Sanders falsified or directed the falsification of business records at the end of Q1 2011 to meet an "asset coverage ratio" covenant; and (3) Counts 24 and 36 alleging Sanders had reversed, or directed the reversal of, disbursement write-offs in January 2010 and 2011. A.1019-25, 1026. The jury deadlocked on the remaining counts. A.1027. On October 19, 2015, the trial judge granted a mistrial, *see* A.1028.

On February 26, 2016, the trial court dismissed all 15 Grand Larceny counts (Counts 2-16), ruling that no rational juror could find that Sanders or his co-defendants acted with larcenous intent. *See* A.1043. As to the private placement and establishment of revolving lines of credit—the central tenet forming the basis for the Grand Larceny counts as well as the central component to the prosecution's Scheme to Defraud, Martin Act violation and Conspiracy counts—Sanders had no intent, no involvement, and, thus, no culpability whatsoever, as a matter of law. The trial court's post-trial dismissal of the Grand Larceny charges constitutes an acquittal. *See Tibbs v. Florida*, 457 U.S. 31, 43 (1982); *People v. Biggs*, 1 N.Y.3d 225, 229 (2003) (citing *Smalis v. Pennsylvania*, 476 U.S. 140, 142 (1986)); *Burks v. United States*, 437 U.S. 1, 18 (1978); *People v. Mayo*, 48 N.Y.2d 245, 249 (1979)); *People v. Suarez*, 122 Misc. 2d 1040, 1042 (Sup. Ct., Bronx Cty. 1984) (citing *Tibbs*,

457 U.S. 31). The trial court even characterized the dismissal of the grand larceny counts as an "acquittal." *See* A.1076 (noting that Sanders was "acquitted of intent to steal.").

The acquittals stand as a conclusive determination that the prosecution had not, and could not, prove beyond a reasonable doubt that Sanders engaged in the charged conduct.

C. The Acquitted FBR and Grand Larceny Conduct Constituted Elements of the Scheme to Defraud Charge and Were Re-litigated at Trial 2.

As charged in the Indictment, the acquitted FBR and Grand Larceny conduct constituted elements of the remaining Scheme to Defraud count. The Scheme to Defraud count alleged Sanders' methods of perpetrating the fraud on the banks and investing insurance companies were encapsulated in an alleged "Master Plan." A.39-46. According to the prosecution, the Master Plan included reversing disbursement write-offs and reversing write-offs on the so-called "Joel's Amex," A.39-46, conduct of which Sanders had been acquitted. The prosecution further alleged Sanders falsified business records by making or directing others to make false entries and adjustments in Dewey's accounting records in 2009, 2010, and 2011 in furtherance of the purported scheme and the Master Plan, A.40, all of which were separately charged FBR conduct (Counts 21, 34, 49, 51, 52, 53 57 and 69) of which Sanders was acquitted. A.39-46, 55-60, 67-70, 75. The prosecution further accused

Sanders of misrepresenting the Firm's financial condition in order to steal $150 million in the private placement of securities, and $100 million through access to credit lines with certain banks, all separately charged Grand Larceny conduct of which Sanders was acquitted. A.39-52.

The trial court, however, ruled that evidence of the acquitted Grand Larceny and FBR conduct was admissible at Trial 2 to prove the remaining counts. *See* A.1063-64, 1078. In light of the trial court's *in limine* rulings, the prosecution re-litigated at Trial 2 the acquitted FBR conduct relating to the "Joel's Amex,"[7] the "asset coverage ratio" covenant at the end of Q1 2011,[8] and the reversal of disbursement write-offs in January 2010 and 2011[9] in order to prove the Scheme to Defraud charge at Trial 2. It re-litigated the acquitted Grand Larceny conduct in order to prove the Scheme to Defraud charge. *See, e.g.*, A.1163-65.

[7]Indeed, the prosecution made more than 100 references during Trial 2 to "Joel's Amex," "American Express" and the "Amex" when discussing Sanders' alleged criminal conduct. *See* A.1104, 1106.1, 1181-86, 1188-94, 1199, 1202-04, 1218-21, 1227, 1229-30, 1233, 1255-64, 1267-78, 1282, 1285, 1288-93, 1295, 1297.1-1297.10, 1297.19-1297.20, 1298-99, 1321

[8]*See* A.1127.1, 1135.1.

[9]*See* A.1103.1, 1177.1-1177.3, 1178.1-1178.2, 1179-1179.1, 1180-1180.5, 1188.1, 1189.1, 1192-1192.1, 1194,, 1198.1, 1199.1-1199.4, 1228-30, 1231.1-1231.11, 1233.1, 1244, 1250.1-1250.3, 1277, 1297.21, 1299-1299.1, 1317.

D. The Acquitted Conduct Constituted the Object of the Conspiracy Charge and Was Re-litigated at Trial 2.

The object of the Conspiracy count is predicated on the acquitted Grand Larceny and FBR conduct. A.88-89. A conspiracy "consists of an agreement to commit an underlying substantive crime . . . coupled with an overt act committed by one of the conspirators in furtherance of the conspiracy." *People v. Caban*, 5 N.Y. 3d 143, 149 (2005). The essence of the Conspiracy is an agreement to commit the criminal "object" of the conspiracy, as defined in the Indictment. *See United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003); *see also Iannelli v. United States*, 420 U.S. 770, 777 (1975). The "object" of the Conspiracy is an essential element of the charge.

The prosecution "must prove, beyond a reasonable doubt, that the defendant possessed the specific intent to commit the offense that was the object of the conspiracy." *United States v. Valle*, 807 F.3d 508, 515-16 (2d Cir. 2015); *see also United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010). Indeed, "the defendant has to know what the 'object' of the conspiracy he joined was." *United States v. Ulbricht*, 31 F. Supp. 3d 540, 551 (S.D.N.Y. 2014). The prosecution must prove that "the defendant agree[d] on the essential nature of the plan,' and that there was a 'conspiracy to commit a particular offense and not merely a vague agreement to do something wrong.'" *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008).

A single conspiracy agreement may encompass multiple offenses. The Supreme Court has held that a conspiracy to commit multiple offenses remains a single agreement, *and a single conspiracy*. *Braverman v. United States*, 317 U.S. 49, 53 (1942). Thus, as charged in the Indictment here, in a single hypothetical conspiracy "X," with a single stated object of committing both criminal offenses "A" and "B," the conspiracy does not consist of a separate agreement for each offense—that is, one agreement to commit offense A and a separate agreement to commit offense B—but rather exists as a single, unitary agreement. The unitary agreement and "object" of the conspiracy is the *in toto* commission of crimes A *and* B.

Here, the Indictment charged a single criminal conspiracy with a singular "object":

> To ensure that the Firm maintained and was able to draw on its financing facilities and was able to obtain and draw on a $100 million revolving credit facility and obtain a $150 million private placement in 2010. In order to effectuate the object of the conspiracy, the defendants: (i) made and caused others to make fraudulent accounting entries in the firm's accounting system; and (ii) made intentional misrepresentations to investors, financial institutions and others regarding the financial condition and practices of the Firm.

A.89. The "object" of the Conspiracy charge ("X") included both the acquitted Grand Larceny conduct and the acquitted FBR conduct (that is, an "A+B" object).[10] And, despite its designation as a Conspiracy to commit Scheme to Defraud, the Indictment explicitly defines the object of the Conspiracy count as inclusive of the

[10] X (conspiracy) = A (grand larceny) + B (falsifying business records), the conspiracy is an "A+B" conspiracy.

acquitted Grand Larceny and acquitted FBR conduct. *See* A.89. The charged Conspiracy "X" had the singular object of Sanders committing *both* "A" (grand larceny) *and* "B" (falsifying business records).

To carry its burden, the prosecution had to prove beyond a reasonable doubt that Sanders engaged in Grand Larceny conduct and engaged in FBR conduct of which Sanders was acquitted at Trial 1. But, given Sanders' acquittal of Grand Larceny and the FBR conduct at Trial 1, the prosecution could never prove in Trial 2 beyond a reasonable doubt that Sanders engaged in that same Grand Larceny and FBR conduct as the "object" of the charged Conspiracy. Thus, the prosecution could not meet this burden as a matter of law.

E. The Trial Court's Jury Instructions Presented a Legally Impossible Charge Resulting in a Structural Defect at Trial 2.

No jury at Trial 2 could conclude the prosecution proved beyond a reasonable doubt that Sanders committed the acquitted FBR conduct or the acquitted Grand Larceny conduct. During the jury charge at Trial 2, however, the trial court instructed the jury that, to convict Sanders of a Scheme to Defraud and Conspiracy as defined in the Indictment, the jury must find each and every element of the charges beyond a reasonable doubt. *See* A.1382-83, 6074. The trial court had already instructed the jury that the "scheme" element of the Scheme to Defraud consisted of the acquitted Grand Larceny and FBR counts. The trial court further instructed the jury that it may not use the *dismissal* of the Grand Larceny charges in assessing

whether the prosecution proved beyond a reasonable doubt the remaining counts that were predicated on the acquitted Grand Larceny conduct. *See* A.1378.2.

The trial court's jury charge virtually guaranteed that the jury *would* consider the fact of the Grand Larceny conduct that was raised during Trial 2 in determining whether the prosecution had met its burden. The jury was instructed that it could, despite the legal impossibility, find the prosecution met its burden to prove beyond a reasonable doubt the elements of the remaining charges that were the acquitted Grand Larceny and FBR conduct in order to convict Sanders of Scheme to Defraud or Conspiracy. To charge the jury with considering whether the prosecution carried its burden and proved beyond a reasonable doubt at Trial 2 the acquitted conduct misdirected the jury in its role as finder of fact and amounted to a legal impossibility. These instructional errors that go directly to the jury's role, what evidence it may properly consider or whether the prosecution carried its burden, infect the entire trial process, *Sullivan*, 478 U.S. at 281; *Facey*, 127 A.D.3d at 1257; *Garcia*, 255 A.D.2d at 268-269, and are structural defects compelling automatic reversal.

II. THE TRIAL COURT VIOLATED SANDERS' CONSTITUTIONAL DOUBLE JEOPARDY PROTECTIONS BY ALLOWING INTRODUCTION OF EVIDENCE OF ACQUITTED CONDUCT.

In order to convict Sanders at Trial 2, the prosecution was required to prove beyond a reasonable doubt each element of Scheme to Defraud, Martin Act violation, and Conspiracy. The prosecution could not do so without violating

Sanders' double jeopardy protections. Since the acquitted FBR and Grand Larceny counts from Trial 1 form the basis of the remaining counts—criminal elements susceptible to the same evidentiary proof— the acquitted counts should have served as an absolute bar to the re-litigation of the remaining counts at Trial 2. Accordingly, the trial court violated Sanders' constitutional double jeopardy protections by allowing the introduction of evidence of the acquitted conduct.

A. Double Jeopardy/Collateral Estoppel.

The Fifth Amendment Double Jeopardy Clause[11] (and Article I, Section 6 of the New York Constitution) and the doctrine of collateral estoppel (or "issue preclusion") bar the prosecution from "relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." *Yeager v. United States*, 557 U.S. 110, 119 (2009). "A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it" and "its finality is unassailable." *Yeager*, 557 U.S. at 122-23; *see also Bravo-Fernandez v. United States*, 137 S. Ct. 352, 357-58 (2016). The prosecution should not be permitted to make repeated attempts to convict for a particular alleged offense, thereby enhancing "the possibility that even though innocent he may be found guilty." *Yeager*, 557 U.S. at 117-18 (internal citations omitted).

[11] U.S. CONST. amend. V, states "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." N.Y. CONST. art. I, § 6 states "No person shall be subject to be twice put in jeopardy for the same offense. . . ."

"[T]he doctrine of collateral estoppel is a basic and essential part of the Constitution's prohibition against double jeopardy." *See United States v. Mespoulede*, 597 F.2d 329, 332 (2d Cir. 1979) (internal citations omitted). Under this doctrine, once an issue of ultimate fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in *any* future matter. *People v. Rasero*, 62 A.D.2d 845, 849 (1st Dep't 1978); *People v. Acevedo*, 69 N.Y.2d 478, 485-87 (1987) (litigation of an issue should be precluded where the "State attempts to prove [a defendant's] guilt by re-litigating a settled fact issue, once necessarily decided in his favor, *whether it is a question of ultimate fact or evidentiary fact*.") (emphasis added).

The prosecution may not introduce evidence of acquitted conduct against a defendant if the trial court found after an examination of the record in the prior proceeding that either the finder of fact or court as a matter of law necessarily resolved the issue in the previous trial against the prosecution after a full and fair opportunity to litigate the matter. *See Yeager*, 557 U.S. at 120. Once an issue of ultimate fact has been determined by a valid and final judgment of acquittal, it cannot be litigated in a second trial for a separate offense. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

This is true even in cases of a mixed verdict where a jury acquits on some charges, but deadlocks on others so long as the charge(s) on which the jury failed to

reach a verdict concern the same issue of ultimate fact. *See Yeager*, 557 U.S. at 122-25; *see also United States v. Coughlin*, 610 F.3d 89, 98-100 (D.C. Cir. 2010) (the jury acquitted where they could not find the presence or absence of a defendant's requisite criminal intent). *Yeager* involved a former Enron executive charged with fraud, conspiracy, money laundering, and insider trading. *Yeager*, 557 U.S. at 114. The Supreme Court held that when the jury acquits on one count, but fails to reach a verdict on another count concerning the same issue of ultimate fact, the acquittal has preclusive effect. *Id.* at 122-25. On remand, the Fifth Circuit gave preclusive effect to the acquittal and ultimately determined that the defendant should not have been re-tried on the deadlocked counts. *United States v. Yeager*, 334 F. App'x 707, 708-709 (5th Cir. 2009). Accordingly, double jeopardy barred the prosecution from pursuing any charges containing "essential element[s]" previously decided in the accused's favor. *Yeager*, 557 U.S. at 111; *see also Coughlin*, 610 F.3d at 98-100 (finding fraudulent intent was an essential element of both acquitted and deadlocked mail fraud charges at trial 1, court ruled double jeopardy clause bars retrial on deadlocked charges).

New York courts "have tended to favor defendants in the application of collateral estoppel because of concerns for due process, double jeopardy, the right to a jury trial, fundamental fairness and preventing undue harassment." *People v. Aguilera*, 82 N.Y.2d 23, 30-31 (1993) (citing *Ashe*, 397 U.S. at 436); *see also*

Acevedo, 69 N.Y. 2d at 485. The denial of a double jeopardy motion raises a question of law and is reviewed *de novo*. *See United States v. Gunn*, 366 F. App'x 215, 217 (2d Cir. 2010); *see also United States v. Olmeda*, 461 F.3d 271, 278 (2d Cir. 2006). The trial court erred when it denied Sanders' double jeopardy motion to dismiss and permitted the prosecution to introduce the acquitted conduct at Trial 2.

B. The Acquitted FBR and Grand Larceny Conduct Constituted Elements of the Remaining Charges at Trial 2.

As discussed above under Issue I, Sanders' involvement in, and intent to carry out or direct others to carry out, the Grand Larceny and FBR conduct were conclusively resolved in Sanders' favor at Trial 1. As charged in the Indictment[12], the acts forming the basis for the acquitted Grand Larceny and FBR counts were indispensable elements to the remaining Scheme to Defraud, Martin Act violation, and Conspiracy counts and share the same ultimate factual issues. Proving these remaining counts at Trial 2 was dependent upon the prosecution's ability to prove Sanders knew about, participated in, carried out and/or directed others to carry out the Grand Larceny and FBR conduct of which he was acquitted at Trial 1. *See* A.750, 950-56.

The Scheme to Defraud count detailed conduct the prosecution accused Sanders of engaging in to perpetrate the fraud on the banks and investing insurance

[12] The Indictment, as a charging instrument, bound the prosecution to the charges as framed therein.

companies, and that such conduct was encapsulated in an alleged "Master Plan" discussed above in Issue I. A.39-46. The prosecution further charged Sanders with violating the Martin Act by defrauding insurance companies in connection with the $150 million private placement of securities between late December 2009 and April 16, 2010. A.89. Those instances of alleged fraudulent taking were 13 of the acquitted Grand Larceny counts (Counts 2-14). A.46-51. Finally, the prosecution charged Sanders in the Indictment with taking part in a criminal conspiracy with his co-defendants with intent to commit the scheme to defraud. A.89-98. The object of the alleged criminal conspiracy—an essential element of the Conspiracy charge—as defined by the prosecution in the Indictment were both the acquitted Grand Larceny and acquitted FBR conduct. *See* A.89-90.

On May 31, 2016, Sanders moved *in limine* to preclude the prosecution from introducing evidence of the acquitted FBR conduct on grounds of collateral estoppel and double jeopardy. A.119-61. At an August 12, 2016 hearing, the defense moved to additionally exclude evidence relating to the acquitted Grand Larceny conduct. A.187-88, 190. The trial court denied the defense's motion *in limine*, holding that the evidence was relevant to the remaining charges. *See* A.178-79, 1889, 193. Sanders moved for reconsideration of the trial court's ruling, *see* A.193-95, which the trial court ignored without comment. A.195.

C. At Trial 2, the Trial Court Violated Sanders' Double Jeopardy Protections By Permitting Re-litigation of Acquitted FBR and Grand Larceny Conduct to Prove the Scheme to Defraud Count (Count 1).

Introduction of evidence on an ultimate issue already resolved at Trial 1 violated Sanders' double jeopardy protections. *See Mespoulede*, 597 F.2d at 335. Moreover, the manner and frequency with which the prosecution referenced and relied on Sanders' acquitted conduct during Trial 2 colored and tainted the entire trial, skewed the jury and resulted in Sanders' ultimate conviction. Accordingly, the trial court committed reversible error by allowing the prosecution to introduce evidence of the acquittals into Trial 2 and by forcing Sanders to re-litigate and defend against those acquitted acts.

1. Sanders' Acquittal at Trial 1 of FBR Charges Relating to Improper Accounting Adjustments to the "Joel's Amex" Barred Re-litigation of the Same Conduct at Trial 2.

FBR counts 21, 34, 49 and 69 charged Sanders with making, or causing others to make, improper accounting adjustments relating to a $2.4 million balance on the so-called "Joel's Amex."[13] At Trial 1, the prosecution contended that while the $2.4 million Amex balance should have been written off and treated as an expense no later than 2008, the write-off was improperly reversed at Sanders' direction and

[13] The prosecution's evidence at Trial 1 established *only* that the Amex card was issued in Sanders' name, not that he used it or directed others to use it for any Firm purpose. *See* A.764-65. The repeated reference to the Amex as a tool used to perpetuate criminal misconduct was false, misleading and prejudicial.

treated as collectible during the period 2008 through 2011, thereby artificially inflating Dewey's income by $2.4 million in each of the four years. *See* A.1360-70. The jury in Trial 1 disagreed and acquitted Sanders of Counts 21, 34, 49 and 69, absolving Sanders of masterminding the "improper" accounting treatment of adjustments relating to the Amex. That outcome was entirely consistent with the evidence adduced that uniformly established Sanders had no awareness of, role in, direction of or intent to undertake any improper accounting related to the Amex balance at any time. *See, e.g., Mullikin Testimony* – A.766-69, 771 (confirming write-offs in 2009/2010 were at Canellas' direction without Sanders' involvement); A.779 (no firsthand knowledge about who in Firm received/reviewed Amex statements); A.878-79 (Sanders was not copied on any emails relating to adjustments to the Amex account); *Harrington Testimony* -- A.898-900 (same).

Not only was Sanders not addressed or copied on a single email presented by the prosecution as evidence on this issue, the prosecution presented no evidence that Sanders participated in the alleged improper accounting treatment of the $2.4 million balance on the Amex account. The basis for the jury's decision to acquit Sanders at Trial 1 of Counts 21, 34, 49 and 69 was clear: (1) Sanders did not have the requisite *intent* to commit theses specific charged crimes, and (2) Sanders did not participate in nor was he even *aware* of the commission of these specific acts that are alleged to have formed the basis for the acquitted FBR counts. An examination of the Trial

1 record compels the conclusion that the jury necessarily concluded Sanders did not make false entries, did not direct others to make false entries and did not even know about the false entries in Dewey's business records relating to the Amex account. The prosecution also failed to adduce any evidence that Sanders had the requisite criminal *intent* to carry out such charged conduct. Sanders' lack of participation, awareness of and intent to carry out or direct others to carry out the charged conduct as to the Firm's Amex are issues of ultimate fact decided with finality by the jury at Trial 1. *See Mespoulede*, 597 F.2d at 335.

The prosecution, however, saturated the record at Trial 2 with inflammatory references to alleged improper accounting adjustments to the Joel's Amex.[14] Permitting the prosecution to re-litigate those matters at Trial 2 to prove the Scheme to Defraud violated Sanders' constitutional double jeopardy protections. *See Yawn v. United States*, 244 F.2d 235, 237 (5th Cir. 1957) (prosecution precluded from re-litigating facts surrounding substantive charge of possession for which defendant had been acquitted at prior trial); *see also Sealfon v. United States*, 332 U.S. 575, 580 (1948) (acquittal of conspiracy charge was favorable determination regarding facts essential for a conviction on the substantive offense). On this basis alone, Sanders' Scheme to Defraud conviction at Trial 2 must be reversed and vacated.

[14] *See supra* n.7.

2. Sanders' Acquittal at Trial 1 of FBR Charges related to the "Asset Coverage Ratio" and Reversed Disbursement Write-offs Barred Re-litigation of the Same Conduct at Trial 2.

FBR counts 51, 52, 53 and 57 charged Sanders with falsifying business records at the end of Q1 2011 in order to meet an "asset coverage ratio" covenant.[15] FBR counts 24 and 36 charged Sanders with reversing, or directing that others reverse, disbursement write-offs in January 2010 and 2011. An examination of the Trial 1 record compels the conclusion that the jury necessarily concluded Sanders did not make false entries, did not direct others to make false entries and did not even know about the false entries in Dewey's business records relating to the asset coverage ratio or the reversal of disbursement write-offs. The prosecution introduced no evidence at Trial 1 connecting Sanders to these transactions. In fact, the prosecution's documentary and testimonial evidence showed the opposite: that Sanders was largely *excluded* from emails in which Canellas, Cascino, and L. Rodriguez purportedly discussed falsifying records to meet the "asset coverage ratio" at the end of the first quarter of 2011. *See, e.g.*, A.863. This was strong evidence that Sanders had not been involved in nor even knew about the discussion or referenced actions. A.946-47. The jury rejected the prosecution's theory and

[15]The "asset coverage ratio" is a measurement of risk by which Dewey could calculate its ability to repay any debt obligations through the sale of its assets; it is at least one criteria potential investors are able to assess risk and Dewey's financial health.

acquitted Sanders at Trial 1 of all FBR counts related to meeting the "asset coverage ratio" covenant.

Likewise, there was no credible evidence establishing Sanders' involvement in or knowledge of reversals of disbursement write-offs introduced at Trial 1, only Cascino's testimony, which neither inculpated Sanders nor was credible in light of the numerous contradictions and internal inconsistencies in her testimony. *See* A.903-04, 907-09 (Cascino contradicting her own earlier testimony regarding Sanders' direction, involvement in the write-offs), 1482 (Cascino testimony contrary to actual documentary evidence). This is reinforced in the balance of the prosecution's documentary evidence as well, which establishes Sanders had no involvement. *See*, *e.g.*, *See* A.1480, 1507 (Casino seeking direction from Canellas, not Sanders, on whether to reverse the disbursement write-offs).

Moreover, the prosecution failed to prove that the write-offs, or their reversals, were improper or done with intent to defraud. The jury acquitted Sanders of all charges related to reversal of disbursement write-offs in January 2010 and 2011. There was simply no evidence of Sanders' knowledge or criminal intent to convict Sanders of these charges. The acquittals at Trial 1 on these FBR charges were based on an utter lack of proof connecting Sanders to the charged conduct and, it follows, a lack of proof as to any criminal *intent* to carry out such charged conduct. As in *Yeager* and *Yawn*, Sanders' lack of participation in, awareness of, and intent to carry

out, or direct that others carry out the conduct alleged regarding falsifying records to meet the asset coverage ratio and reversing disbursement write-offs were issues of ultimate fact determined with finality at Trial 1.

At Trial 2, the trial court permitted the prosecution to re-litigate those matters in order to prove Sanders engaged in a Scheme to Defraud banks and investors. The prosecution then saturated the record with discussion of the "asset coverage ratio"[16] and "disbursement write-off reversal"[17] and accusations that Sanders engaged in such conduct. The trial court's ruling violated Sanders double jeopardy protections and requires reversal. *See Yeager*, 334 F. App'x at 709 (the issue of possession of insider information was decided in defendant's favor and was a critical issue of ultimate fact for the insider trading and money laundering counts, precluding relitigation of those issues); *see also Yawn*, 244 F.2d at 237.

3. Sanders' Acquittal at Trial 1 of Grand Larceny Charges relating to theft from Investing Insurance Companies and Banking Institutions in Excess of $1 million Barred the Re-litigation of the Same Conduct at Trial 2.

The trial court's Trial 1 dismissal of all Grand Larceny counts was based on the court's finding that there was a lack of any evidence of Sanders' alleged criminal intent. To convict Sanders of a Scheme to Defraud at Trial 2, the prosecution had to

[16] *See supra,* n.8.

[17] *See supra* n.9.

prove beyond a reasonable doubt that Sanders committed, and intended to commit, *grand larceny* which, for the reasons discussed above, the prosecution could not do as a matter of law. The Grand Larceny acquittals had preclusive effect. *See Yeager*, 334 F. App'x at 709. In determining that Sanders did not possess the requisite larcenous intent, the trial court determined with finality that Sanders did not commit any of the Grand Larceny counts. *See Mespoulede*, 597 F.2d at 332-33; *see also Yawn*, 244 F.2d at 237. Permitting the prosecution to re-litigate the acquitted Grand Larceny conduct at Trial 2 under the veil of predicate acts for the Scheme to Defraud charge violated Sanders' double jeopardy protections.

Yet, at Trial 2, the prosecution introduced the testimony of certain witnesses relating to Sanders' alleged grand larceny conduct. One in particular, Lori Cuneo ("Cuneo"), a managing director at JPMorgan Chase Securities, testified regarding the insurance companies investing in Dewey's private placement. The prosecution examined Cuneo about each and every investor in the Firm's private placement, and how much each invested and lost as a result of Sanders' alleged grand larceny. A.1163-65 (discussing Counts 2-14, alleged "victims" and amount of loss to each victim as a result of Sanders' alleged scheme). Evidence relating to those investing insurance companies was not just *related* to the acquitted Grand Larceny conduct, but *was* the quintessence of the Trial 1 acquitted Grand Larceny conduct. The trial

court's ruling admitting the prosecution's evidence on the acquitted Grand Larceny conduct violated Sanders' constitutional rights.

D. At Trial 2, the Trial Court Violated Sanders' Double Jeopardy Protection By Permitting Re-litigation of the Acquitted Grand Larceny Conduct to Prove the Martin Act Violation.

As discussed above, the trial court dismissed all Grand Larceny charges for lack of any evidence of larcenous intent. To convict Sanders of violating the Martin Act, the prosecution had to prove beyond a reasonable doubt that Sanders engaged in the acquitted Grand Larceny conduct, which the prosecution could not do as a matter of law. The Grand Larceny acquittals had preclusive effect, *see Yeager*, 334 F. App'x at 709, and the trial court's conclusive finding on the Grand Larceny conduct precluded re-litigation at Trial 2, *see Mespoulede*, 597 F.2d at 332-33; *Yawn*, 244 F.2d at 237. Permitting the prosecution to re-litigate the acquitted Grand Larceny conduct to prove the Martin Act charge, *see* A.1163-65, violated Sanders' double jeopardy protections.

E. At Trial 2, the Trial Court Violated Sanders' Double Jeopardy Protections By Permitting Re-litigation of the Acquitted FBR and Grand Larceny Counts to Prove the Conspiracy Charge.

A conspiracy agreement, and the defined object of that agreement, are essential elements of a conspiracy charge. The object of the conspiracy charge itself is predicated on the acquitted Grand Larceny and FBR counts. A.88-89. As discussed above under Issue I, a conspiracy "consists of an agreement to commit an

underlying substantive crime . . . coupled with an overt act committed by one of the conspirators in furtherance of the conspiracy." *Caban*, 5 N.Y.3d at 149. The essence of conspiracy is an agreement to commit the criminal "object" of the conspiracy as defined in the charging instrument. *See Jimenez Recio*, 537 U.S. at 274; *see also Iannelli*, 420 U.S. at 777. The prosecution "must prove, beyond a reasonable doubt, that the defendant possessed the specific intent to commit the offense that was the object of the conspiracy." *Valle*, 807 F.3d at 516; *see also Torres*, 604 F.3d at 65 This, the prosecution could not do as a matter of law in light of the trial court's dismissal with prejudice of the Grand Larceny counts.

"[T]he defendant has to know what the 'object' of the conspiracy he joined was." *United States v. Ulbricht*, 31 F. Supp. 3d 540, 551 (S.D.N.Y. 2014). A single conspiracy agreement may encompass multiple offenses. The Supreme Court has held that a conspiracy to commit multiple offenses remains a single agreement, *and a single conspiracy*. *See Braverman*, 317 U.S. at 53. Thus, in the hypothetical conspiracy, "X," with the single stated object of committing both criminal offenses "A" and "B," the conspiracy does not consist of a separate agreement for each offense—that is, one agreement to commit offense A and a separate agreement to commit offense B—but rather exists as a single, unitary agreement. The unitary agreement and "object" of the conspiracy is the *in toto* commission of crimes A *and*

B. Crimes A and B are not merely overt acts in furtherance of the conspiracy, but the unitary conspiracy object itself to which the overt acts were designed to achieve.

As discussed above in Issue I, the Indictment charged a singular object of the criminal conspiracy. The charged Conspiracy "X" had the singular object of Sanders committing *both* "A" (grand larceny) *and* "B" (falsifying business records). To prove the essential element of the charged Conspiracy beyond a reasonable doubt, the prosecution would necessarily have to prove beyond a reasonable doubt that Sanders, at a minimum, engaged in Grand Larceny. But, because the trial court had already ruled the prosecution could not prove beyond a reasonable doubt that Sanders committed Grand Larceny as a stand-alone count, the prosecution likewise could not prove Sanders engaged in Grand Larceny as part of the object of the charged Conspiracy. This is because the Conspiracy as charged was an "A+B" conspiracy, not an "A *or* B" conspiracy.[18] Following Sanders' acquittal at Trial 1 of 15 Grand Larceny counts and 14 FBR counts, the prosecution should have been barred from re-litigating whether Sanders committed Grand Larceny, whether as a free-standing charge, or as part of the unitary object of the Conspiracy.

The prosecution also re-litigated the charges of making or causing others to make improper accounting adjustments relating to a $2.4 million balance on the

[18] Stated mathematically, X (conspiracy) = A (grand larceny) + B (falsifying business records), the conspiracy is an "A+B" conspiracy.

"Joel's Amex" (Counts 21, 34, 49, 69), falsifying records to meet the "asset coverage ratio" for Q1 2011 (Counts 51, 52, 53, 57), and reversing or directing others to reverse the disbursement write-offs in January 2010 and 2011 (Counts 24, 36). Moreover, the prosecution was permitted to re-litigate whether Sanders had the larcenous intent to unlawfully take millions of dollars from 15 separate bank lenders and insurance companies (Counts 2-16), in furtherance of the object of the criminal conspiracy, which violated Sanders' double jeopardy protections. Those charges constituted an essential component of the object of the conspiracy. *See Torres*, 604 F.3d at 65 (finding that in order to convict the defendant with conspiracy, the government "must prove at least the degree of criminal intent necessary for the substantive offense itself.") (internal citations omitted).

Even if other deadlocked FBR counts also were re-litigated, that the foregoing acquitted FBR counts *could have* reasonably formed the basis of the Trial 2 conviction for criminal conspiracy compels reversal of the conviction. *See Torres*, 604 F.3d at 65; *see also Sealfon*, 332 U.S. at 580. Further, even if unclear and ambiguous about which FBR counts comprised the conspiracy itself, there could have been no ambiguity as to the Grand Larceny counts given the trial court's dismissal with prejudice of all counts in their entirety and finding, as a matter of law, that Sanders lacked the requisite criminal intent. Lacking larcenous intent as a matter of law compels the conclusion that the prosecution could not prove, beyond

a reasonable doubt, that Sanders had the requisite intent to commit at least one integral part of the conspiracy object (grand larceny). That ruling alone not only made it legally impossible for the prosecution to prove the singular A+B object of the conspiracy as charged, but constitutionally impermissible for the prosecution to re-litigate the "A+B" conspiracy as charged in the Indictment. The trial court violated Sanders' double jeopardy protections by permitting the prosecution to re-litigate acquitted conduct in pursuit of establishing an "A+B" conspiracy. For these reasons, Sanders' conviction at Trial 2 of Conspiracy must be reversed and vacated.

F. The Trial Court's Double Jeopardy Violations Were Not Harmless Beyond a Reasonable Doubt.

When the asserted error is of a constitutional dimension, the error may only be deemed harmless if "there is no reasonable possibility that the error might have contributed to defendant's conviction and that it was thus harmless beyond a reasonable doubt." *People v. Crimmins*, 36 N.Y.2d 230, 237 (1975); *Corby v. Artus*, 699 F.3d 159, 169 (2d Cir. 2012) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). In determining whether or not an error is harmless beyond a reasonable doubt, the court considers: "(1) the quantum and nature of the evidence against defendant if the error is excised and (2) the causal effect the error may nevertheless have had on the jury." *People v. Pettaway*, 153 A.D.2d 647, 648 (2d Dep't 1989) (citing *Crimmins*, 36 N.Y.2d at 240)). The trial court's error was not harmless. *People v. Stone*, 29 N.Y.3d 166, 171 (2017)

There can be no doubt that the introduction of evidence regarding the Firm's "Joel's Amex", asset coverage ratio, reverse disbursement write-offs, and grand larceny conduct contributed directly to Sanders' conviction. The prosecution heavily relied on evidence relating to Sanders' acquitted conduct throughout numerous days of questioning and obtaining witness testimony, and in its summations. *See Yawn*, 244 F.2d at 238 (erroneous admission of the questioned evidence was harmful to the defendant). The prosecution thereafter repeatedly highlighted evidence of Sanders' acquitted FBR and Grand Larceny conduct in an effort to taint the jury and demonstrate Sanders was predisposed to illegal conduct. The misconduct, and the trial court's failure to exclude the infirm evidence, was not harmless error. Evidence of Sanders' guilt is not overwhelming. The prosecution also cannot show that absent admission by the trial court of the constitutionally prohibited evidence, fair-minded jurors would not reach a verdict of guilty. Accordingly, the prosecution cannot meet its burden of showing that the trial court's error was harmless beyond a reasonable doubt.

III. THE TRIAL COURT ERRED WHEN IT DENIED SANDERS' MOTION TO DISMISS THE SCHEME TO DEFRAUD, MARTIN ACT VIOLATION AND CONSPIRACY COUNTS FOR INSUFFICIENT EVIDENCE *PRIOR TO TRIAL 2*.

The trial court's dismissal of the Grand Larceny counts, as well as the acquittals of key FBR counts discussed above in Issues I and II, should have compelled the trial court to dismiss the remaining charges of Scheme to Defraud,

Martin Act violation and Conspiracy before Trial 2 because of the overlapping evidentiary proof required for each crime. The trial court erred when it denied the defense motion as to those remaining counts.

A. Legal Standard.

The trial court's denial of Sanders' motion to dismiss the Scheme to Defraud, Martin Act violation and Conspiracy charge for insufficient evidence is reviewed de novo. This Court must review the ruling to determine whether legally competent evidence established every element of an offense charged and the defendant's commission thereof. *People v. DeRue*, 179 A.D.2d 1027, 1028 (4th Dep't 1992). This Court must determine whether, after viewing the legally competent evidence presented in a light most favorable to the prosecution, a reasonable jury could have convicted Sanders. *People v. Mayer*, 1 A.D.3d 459, 460 (2d Dep't 2003).

B. The Trial Court's Failure to Dismiss the Remaining Counts Prior to Trial 2 Was Not Harmless Error.

In order for the jury to convict Sanders for Scheme to Defraud, Martin Act violation, and Conspiracy, the jury at Trial 2 would have to find every element of those crimes *beyond a reasonable doubt*. *See* A.1382-83 (Scheme to Defraud); A.1384-85 (Martin Act violation); A.1388 (Conspiracy). The alleged "scheme" was encapsulated in a "Master Plan" which, according to the Indictment, turned on the acquitted FBR conduct: reversing disbursement write-offs and reversing write-offs on the so-called "Joel's Amex," as well as the acquitted Grand Larceny conduct.

A.42-43. Likewise, the Martin Act violation alleged Sanders defrauded insurance companies in connection with a $150 million private placement of securities—the underlying Grand Larceny conduct of which Sanders had been acquitted. And, the object of the alleged "A+B" criminal conspiracy were both the acquitted FBR and Grand Larceny conduct of which Sanders was acquitted. *See* A.88-89.

Had the trial court correctly excluded the acquitted conduct evidence at Trial 2, the foreseeable evidentiary void would have prevented the prosecution from proving each element of the remaining charges beyond a reasonable doubt. *See Torres*, 604 F.3d at 65 (because government could not establish the substantive offense without proving the defendant's knowledge of the underlying conduct, the government could not establish the charge of conspiracy); *People v. Ackies*, 79 A.D.3d 1050, 1056 (2d Dep't 2010) (affirming dismissal of four conspiracy counts because evidence was legally insufficient to establish defendant's participation in conspiracies and his commission of each element for those crimes as charged). The trial court's error denying Sanders' motion to dismiss the Indictment in its entirety prior to Trial 2 was not harmless beyond a reasonable doubt.

IV. THE TRIAL COURT DEPRIVED SANDERS HIS CONSTITUTIONAL RIGHTS BY ADMITTING UNCHARGED MISCONDUCT EVIDENCE IN VIOLATION OF *PEOPLE V. MOLINEUX*.

Prior to the start of Trial 2, Sanders moved *in limine* to preclude the prosecution from introducing evidence of uncharged misconduct, including: (1)

introducing evidence, arguing or even insinuating that Sanders caused the Dewey Bankruptcy; (2) introducing the irrelevant and inflammatory so-called "Cook the Books" email, *see* A.1466, and arguing that Sanders committed accounting fraud; and (3) introducing evidence of Sanders' compensation to establish he financially benefitted from the alleged fraud and igniting class and wealth biases, *see* 119-46, 156-58. The trial court ultimately permitted the prosecution to argue and introduce evidence that Sanders caused Dewey's bankruptcy. *See* A.1092-93, 1112-13, 1127, 1174, 1205. The trial court further permitted the prosecution to introduce the "Cook the Books" email to show Sanders committed accounting fraud, *see* A.1172-73, 1356-59, 1378, 1466, despite excluding the email at Trial 1 as irrelevant. The trial court further permitted the prosecution to introduce evidence of Sanders' compensation to establish Sanders sought to benefit personally from his alleged conduct and to inflame and ignite class bias among the jurors, A.1065-66, 1097, 1103, 1167-68, 1294, 1351. This evidence was not relevant for any legitimate purpose. The trial court abused its discretion admitting this *Molineux* evidence.

A. <u>Legal Standard</u>.

Evidence of uncharged crimes is not admissible at trial if the purpose of introducing such evidence is to show a predisposition to engage in other criminal acts. *People v. Allweiss*, 48 N.Y.2d 40, 46 (1979); *see also People v. Molineux*, 168 N.Y. 264, 291, 345 (1901). The policy underpinnings of this exclusionary rule are

grounded in a recognition that "it is much easier to believe in the guilt of an accused person when it is known or suspected that he has previously committed a similar crime . . . ." *Molineux*, 168 N.Y. at 313. Accordingly, evidence that tends to prove bad character and general criminal propensity must be excluded as a matter of law when it has no additional relevance to a specific issue in the case, because of the very real danger that the trier of fact will overestimate its significance. *People v. Alvino*, 71 N.Y.2d 233, 241 (1987); *see also People v. Foster*, 295 A.D.2d 110, 112 (1st Dep't 2002).

The New York Court of Appeals has cautioned that uncharged crime testimony has a tendency to improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value to the case. *See People v. Resek*, 3 N.Y.3d 385, 389 (2004). Although background evidence of other crimes or bad acts may be admissible in certain circumstances—to complete the prosecution's narrative of the case, or to prove motive, intent, the absence of mistake or accident, a common scheme or plan or the identity of the alleged guilty party, *see Allweiss*, 48 N.Y.2d at 47—none of those exceptions apply here. And, even if relevant for one of the specifically delineated exceptions, such evidence must be excluded if the risk of unfair prejudice outweighs its probative value. *See People v. Mhina*, 110 A.D.3d 1445, 1447 (4th Dep't 2013).

Thus, when the prosecution seeks to introduce *Molineux* evidence, the trial court must undertake a two-part inquiry. The prosecution must first establish that the evidence is relevant to an issue other than mere criminal propensity or bad character of the defendant. If the prosecution carries its burden, the trial court must then conduct a meaningful balancing of the probative value of the evidence against the danger of unfair prejudice to the defendant. *See People v. Hudy*, 73 N.Y.2d 40, 68-70 (1988), *abrogated on other grounds by Carmell v. Texas*, 529 U.S. 513 (2000).

A trial judge's order admitting evidence of an uncharged crime is reviewed for abuse of discretion. *People v. Crawford*, 4 A.D.3d 748, 749 (4th Dep't 2004). A trial court abuses its discretion if it has: "(1) based its ruling on an erroneous view of the law; (2) made a clearly erroneous assessment of the evidence; or (3) rendered a decision that cannot be located within the range of permissible decisions." *United States v. Person*, 745 F. App'x 380, 382 (2d Cir. 2018); *see also People v. Reyes*, 43 Misc. 3d 1225(A), 2014 NY Slip Op. 50789(U), *3 (Crim. Ct., N.Y. Cty. May 19, 2014) (finding a court abuses its discretion when it makes a serious error of judgment or reaches erroneous conclusions of law or the evidence). If the trial court erred by admitting evidence of uncharged crimes, the conviction must be reversed unless the error was harmless. *People v. Anderson*, 120 A.D.3d 1548, 1549 (4th Dep't 2014). A trial court's error is not harmless if there is a significant probability that the jury would have acquitted the defendant had it not been for the errors that occurred.

Crimmins, 36 N.Y.2d at 230. For the reasons discussed below, the trial court's *Molineux* rulings were an abuse of discretion.

B. The Trial Court Erred When It Permitted the Prosecution to Admit Evidence and to Argue that Sanders Caused the Dewey Bankruptcy.

1. Dismissal and Acquittal of all Grand Larceny Counts Rendered Evidence of the *Cause* of the Dewey Bankruptcy Irrelevant.

The trial court's dismissal of the Grand Larceny counts rendered evidence of the "cause" of the Dewey Bankruptcy probative of nothing at Trial 2. *See* A.1071. The trial court ruled (initially) there was "no compelling reason to allow proof of the reasons Dewey & LeBoeuf failed, beyond the fact that it could not pay its debt, including those to the financial institutions alleged to be victims of the fraud." A.1071. The trial court acknowledged that while the *fact* of the bankruptcy was relevant ("fact" evidence), the *cause* of the bankruptcy was not ("cause" evidence), *see* A.1057, and ruled the prosecution could not even "insinuate" that Sanders caused the Dewey Bankruptcy, A.1072.

Because it deemed "cause" evidence to be irrelevant at Trial 2, the trial court did not balance the *lack* of probative value of the "cause" evidence against the danger of unfair prejudice if such evidence was admitted. Unfortunately, the trial court also failed to conduct a meaningful balancing to weigh the probative value of any "fact" evidence of the Dewey Bankruptcy (minimally relevant, if at all) against the substantial danger of unfair prejudice if admitted. The trial court further failed to

recognize that the "fact" evidence to be presented at Trial 2 was conceptually and contextually no different from the "cause" evidence. Recognizing this risk, Sanders' counsel sought a limiting instruction clarifying that, *inter alia*, the jury could not speculate as to what caused Dewey's Bankruptcy, nor could it consider the Bankruptcy "in determining whether or not the prosecution had proven the charges beyond a reasonable doubt." A.1089-90. The trial court declined to give Sanders' proposed instruction. A.1091.

Over Sanders' repeated objections and mistrial motions, the prosecution was permitted to not only insinuate but expressly argue and introduce documentary evidence intended to establish that Sanders "caused" the Dewey Bankruptcy.[19] A.1092-93, 1109, 1112-13. The trial court's eventual instruction omitted critical language precluding the jury's consideration of the *cause* of the Dewey Bankruptcy and its impact on the prosecution's ability to prove its case beyond a reasonable doubt and, thus, did not remedy the prosecution's misconduct. *See* A.1117.

The prosecution's end-run around the trial court's ruling by arguing the Dewey Bankruptcy in close proximity to Sanders' alleged conduct without an

[19] *See, e.g.*, A.1127, 1205 (references to May 2012 bankruptcy filing and appointment of the Dewey Liquidation Trust); A.1174 (statement by Sanders in a December 2008 email that violating the cash flow covenants would result in the Dewey Bankruptcy); A.1467.1 ("It is literally bankruptcy if we pop the covenants"); A.1102, 1166-68, 1197-98.

appropriate limiting instruction left the jury with the solid misimpression and understanding that Sanders' conduct caused the Dewey Bankruptcy and, in turn, the loss of thousands of jobs and family livelihood. The prosecution's use of this "fact" evidence to establish the "cause" of the Dewey Bankruptcy necessarily exceeded the limited purposed for which the prosecution proffered it and was error. *People v. Ortiz*, 142 A.D.2d 248, 252-53 (1st Dep't 1988) (prosecution's use of inadmissible evidence was additionally improper because it went beyond even the proffered reason for its admissibility); *see also People v. Mleczko*, 298 N.Y. 153, 159 (1948) (evidence admitted for one purpose may not be used for another).

Because the trial court determined at the outset that "cause" evidence was not relevant, even a small degree of prejudice would outweigh the lack of any probative value. The trial court's failure to prevent the prosecution from insinuating or arguing that Sanders caused the Dewey Bankruptcy, failure to admonish the prosecution when it violated the ruling, refusal to provide Sanders' requested instruction and denial of the motion for mistrial, all constituted error that was not harmless.[20]

[20] The prosecution's position at the close of Trial 1, in stark contrast to its opening position, *see, e.g.*, A. 759-60, was that "this case is not about why Dewey & LeBoeuf failed," A.948. The prosecution was thus precluded under the doctrine of judicial estopped from taking a contrary position at Trial 2 on the same factual issue. *See Maas v. Cornell Univ.*, 253 A.D.2d 1, 5 (3d Dep't 1999) (doctrine of judicial estoppel precludes the prosecution from "inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding"), *aff'd*, 94 N.Y.2d 87, 91-93 (1999); *see Stewart v. Chautauqua Cty.*

C. After Correctly Excluding the "Cook the Books" Email at Trial 1 as Irrelevant and Inflammatory, the Trial Court Erred When It Admitted it at Trial 2 Despite a Narrowing of Issues.

At Trial 1, the prosecution sought to introduce a December 4, 2008 email in which Sanders states to DiCarmine and Dennis D'Alessandro "I don't want to cook the books anymore." A.1466 (the "Cook the Books" email").[21] The trial court properly excluded the "Cook the Books" email at Trial 1, noting (correctly) it "relate[s] to something very different . . . vendors" and which relates to "capitalizing consulting costs" – an issue not implicated at Trial 1. A.919. The trial court further reasoned the "Cook the Books" email had no relevance whatsoever to "capitalizing or expensing amounts which is very much at issue in this case." A.918-19.

At Trial 2, the prosecution again sought to introduce the "Cook the Books" email. Despite a narrowing of issues at Trial 2, the prosecution argued that the email was relevant to the Trial 2 charges, A.258-61, by associating it with an email dated December 3, 2008, discussing an entirely *unrelated topic*: the prospective reclassification of lease termination fees. Sanders was not even initially copied on

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Bd. of Elections, 69 A.D.3d 1298, 1303 (4th Dep't 2010). Yet, that is precisely what the prosecution sought, and the trial court permitted.

[21] The "Cook the Books" email had no nexus to any criminal scheme in which Sanders allegedly participated. Sanders was inquiring about an IT project directed at integrating the legacy computer systems of Dewey Ballantine and LeBoeuf Lamb following the merger of Dewey & LeBoeuf, and the cost overruns associated with it. A.918.1-919. The "Cook the Books" email also referenced conduct that preceded the charged conduct *by months if not more than an entire year*. A. 918.1-918.2.

the email. *See* A.1465.1. Conflating and associating the two emails—PX 21-035 and PX 21-036—was misleading. A.284. Yet, the trial court concluded the email was not only relevant, but its relevance somehow outweighed the danger of unfair prejudice to Sanders despite not conducting a meaningful and effective balancing of the email's probative value against the risk of unfair prejudice to Sanders. A.1131.

The prosecution thereafter introduced the "Cook the Books" email, A.1129-30, read only select portions of it to the jury, *see* A.1172-73, falsely associated it with the other unrelated email, and repeated the highly inflammatory and baseless phrase "cook the books" throughout its Trial 2 closing summation, *see*, *e.g.*, A.1356-59, 1378. This furthered the prosecution's inflammatory and misleading narrative that Sanders engaged in accounting fraud. A.140-42. Because the "Cook the Books" email was irrelevant at Trial 1, with the narrowing of issues, it was irrelevant at Trial 2. Further, the trial court's determination that somehow the "Cook the Books" email was *less* inflammatory and prejudicial at Trial 2 could not be reconciled with its ruling at Trial 1 and was wholly unsupportable given a plain reading of the email. The trial court abused its discretion and its error was not harmless.

D. The Trial Court Erred When it Admitted Evidence of Sanders' Compensation Which was Irrelevant, Inflammatory and Highly Prejudicial.

At Trial 1, the prosecution presented evidence of Sanders' compensation to establish that Sanders was motivated by personal greed to defraud banks and

investors. *See* A.1374-75. The prosecution argued that Sanders used Dewey and its bank accounts "to feed [his] ego and keep the bottomless ATM [he] had turned Dewey & LeBoeuf into. . . ." A.949. The prosecution then acknowledged in its closing summation that Sanders' compensation was actually *irrelevant*. *See* A.949 (minimizing importance of compensation evidence). If irrelevant, it had no probative value and should have been excluded at Trial 1.

Prior to Trial 2, Sanders moved to preclude the prosecution from arguing or introducing evidence about Sanders' compensation. A.156-58. Evidence of Sanders' compensation at Trial 2 had no relevance or probative value given the Grand Larceny acquittals, *see* A.1043, other than to show Sanders' alleged propensity to steal millions of dollars from Dewey and line his own pockets, in contravention of the principles established in *Molineux*.

The trial court denied the defense Motion, concluding evidence of Sanders' compensation was probative of his "stake in both the continuation of the firm and the alleged conspiracy to keep it unlawfully afloat." A.1065-66. It acknowledged, however, that, at Trial 2, the case is not about Sanders lying to line his own pockets (*i.e.*, steal or commit grand larceny for personal gain) but, instead, about "lying to get money for Dewey & LeBoeuf." A.1077. The trial court permitted the prosecution to introduce evidence of Sanders' compensation and argue that Sanders' salary was a motivating factor for misleading and deceiving the banks and

investors.[22] *See* A.1078, 1373-75. The prosecution's narrative was not supported by, and was at odds with, its own evidence about Sanders' contractual employment relationship with the Firm, *see* A.1167-68, 1450, 1487-89, and evidence of Sanders' genuine good faith motivation to keep Dewey afloat, *see* A.1475.1.

Despite the trial court's rote ruling to the contrary, the evidence had no other conceivable relevance. The prosecution's clear objective was to appeal to wealth and class bias of the jury, which violated Sanders' due process rights. *See United States v. Stahl*, 616 F.2d 30, 32-33 (2d Cir. 1980) (finding prejudicial error where the prosecutor's trial strategy sought to arouse prejudice against defendant due to his wealth); *see, e.g.*, *Koufakis v. Carvel*, 425 F.2d 892, 902 (2d Cir. 1970); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) ("appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them"). The trial court's admission of such evidence constituted an abuse of discretion, compelling reversal. *See Stahl*, 616 F.2d at 32. Moreover, no curative instruction could have remedied the trial court's error permitting tainted evidence of Sanders' money and wealth. *See id.* at 33.

[22] The prosecution argued and presented highly prejudicial testimony regarding Sanders' salary. *See* A.1097. The prosecution further adduced evidence that Sanders, unlike any partner of the Firm, was entitled to his salary and bonus even if the Firm filed for bankruptcy. A.1103, 1167-68, 1195-96.

This evidence, in conjunction with the other evidence of uncharged conduct discussed above, created the prosecution's intended perception of Sanders' greed and criminal propensity. These evidentiary errors together constitute an abuse of discretion by the trial court, as well as misconduct by the prosecution in attempting to bring evidence it knew to be irrelevant, inflammatory, and highly prejudicial, depriving Sanders his right to a fair trial. *See, e.g.*, *People v. Casanova*, 119 A.D.3d 976, 978 (3d Dep't 2014). Cumulatively, the trial court's errors were not harmless and led to Sanders' convictions, which must now be reversed and vacated. Given the absence of sufficient competent evidence of guilt, there is a high probability that the jury would have acquitted Sanders absent the improper evidence. Because this error infected Trial 2, the conviction in its entirety should be reversed and vacated.

V. THE TRIAL COURT DEPRIVED SANDERS' RIGHT TO A FAIR TRIAL BY PERMITING IMPROPER COMMENTS ABOUT SANDERS' DECISION TO NOT TESTIFY, DENIGRATION OF DEFENSE THEORY AND DEFENSE COUNSEL, IMPROPER VOUCHING OF PROSECUTION WITNESSES AND INJECTION OF PERSONAL BELIEFS ON THE EVIDENCE.

The prosecution's misconduct discussed herein, permitted by the trial court, violated Sanders right against self-incrimination and denied Sanders his constitutional right to a fair trial. These errors standing alone and cumulatively violated Sanders' constitutional right to a fair trial.

A. The Prosecution Violated Sanders' Right Against Self-Incrimination by Commenting on His Decision to Not Testify at Trial.

The Fifth Amendment to the U.S. Constitution affords a defendant an absolute constitutional right against being compelled to testify at trial in his/her own defense. Article I, Section 6 of the New York Constitution provides an identical constitutional protection. *See* N.Y. CONST, art. I, § 6 ("No person shall . . . be compelled in any criminal case to be a witness against himself or herself"). A defendant's refusal to testify is not a factor from which an unfavorable inference may be drawn, and a prosecutor's improper comments emphasizing the defendant's decision not to testify constitute error. *See People v. Carvalho*, 256 A.D.2d 1223 (4th Dep't 1998); *see also*, *People v. Houghton*, 155 A.D.2d 883, 884-85 (4th Dep't 1989); *Griffin v. California*, 380 U.S. 609, 615 (1965). Comments about a defendant's invocation of his right to not testify requires reversal unless there "is no reasonable possibility that the error might have contributed to [a] defendant's conviction and that it was thus harmless beyond a reasonable doubt." *People v. Crimmins*, 36 N.Y.2d 230, 237 (1975).

Just as the prosecution may not make any statement that calls attention to the fact that a defendant has not or will not testify at trial, *see People v. Abdul-Malik*, 61 A.D.2d 657, 663 (1st Dep't 1978), it also may not comment or present argument on matters that suggest the defendant must testify in order to fill in factual gaps, *see*

People v. Rial, 25 A.D.2d 28, 30 (4th Dep't 1966). When there is a reasonable probability that the offensive comments may have contributed to the conviction, the error is not deemed harmless and compels reversal of the conviction. *See Abdul-Malik*, 61 A.D.2d at 663; *see also Rial*, 25 A.D.2d at 30. The prosecution need not have directly commented on Sanders' invocation of his right to not testify in order to taint the jury's view of him. *See People v. Hetenyi*, 304 N.Y. 80, 87 (1952) (District Attorney's comment in summation about defendant's lack of "any explanation at all here" concerning crime charged required dismissal). Where, as here, the prosecution leads a jury away from the material issues by drawing inflammatory and irrelevant conclusions that have a tendency to prejudice the jury against the defendant, Sanders' conviction must be reversed and vacated and the indictment dismissed given the grave prejudice. *People v. Ashwal*, 39 N.Y.2d 105, 108-110 (1976).

The prosecution impermissibly commented during opening statements on Sanders' decision to not testify. To illustrate, the prosecution characterized emails sent between Sanders and DiCarmine, or between Sanders and a non-witness at trial, as "***alone***" emails. The prosecution then contrasted an email where a prosecution witness would be expected to testify in order to explain the content or context, with an "alone" email for which no individual (i.e., Sanders) would testify. A.1095-96 ("[T]here will be no one on the witness stand who will be able to walk you through

[the alone emails] and explain what the conversation as about.") The defense objected to the prosecution's improper comment on Sanders' anticipated invocation of his right to not testify at trial and moved for a mistrial. A.1122. The prosecution's argument had the effect of forcing Sanders to choose between exercising his right to remain silent, or waiving that right under duress in order to take the stand and testify in his own defense to explain any "alone" emails the prosecution may introduce. It further had the effect of tainting the jury's view of Sanders and his decision to not testify when measured against the prosecution's introduction of the "alone" emails.

Given the prosecution's comments regarding the absence of any explanatory testimony, Sanders would have been the only "logical person" able to explain the circumstances within the email. *See Rial*, 25 A.D.2d at 30. The prosecution also improperly commented during closing summation on Sanders' unwillingness to testify or address other evidentiary gaps. *See* A.1332, 1337-38. These together conveyed to the jury that, while the prosecution must cover everything and be transparent, the defense obfuscates and/or ignores purportedly key evidence. It further raises among the jurors questions about *why* Sanders declined to testify, and whether his declination is reflective of some degree of consciousness of guilt.

Permitting the prosecution to force Sanders into having to choose between remaining silent and taking the witness stand to testify, explain, or rebut the prosecution's skewed interpretation of an email, *see, e.g.*, A.1466, or other evidence

subject to the prosecution's narrative was highly improper. The jury was left with the solid impression that it would need to accept the prosecution's explanation since Sanders declined to testify, and necessarily draw an unfavorable inference against Sanders.[23] The prosecution's comments tainted the jury. Given the lack of sufficient competent evidence to otherwise convict Sanders, such comments contributed substantially to the conviction, and were not harmless error. The conviction must be reversed and vacated on this ground alone.

B. The Prosecution Violated Sanders' Right to a Fair Trial By Denigrating the Defense Theory and Attacking Defense Counsel.

The prosecution may not denigrate defense counsel or suggest that defense counsel is misleading the jury. *See People v. McReynolds*, 175 A.D 2d 31, 31-32, (1st Dep't 1991) ("it is improper to mischaracterize the defense and impugn defense counsel's integrity"). During its closing argument, however, the prosecution made inflammatory remarks and references to the defense theory and engaged in *ad hominem* attacks suggesting defense counsel was misleading or manipulating the jury. *See, e.g.*, A.1333 (denigrating defense as "spinning" evidence to its benefit); A.1339 (denigrating defense as contorting analogies to its benefit); A.1340 (calling into question the quality of defense counsel); A.1344 (calling into question veracity

[23] The trial court provided an inadequate instruction directing the jury to draw no unfavorable inferences from Sanders' failure to testify, failed to draw a nexus between the instruction and the prosecution's repeated improper references to the "alone" emails. A.1378.1.

of defense's statements regarding witnesses); A.1347-48 (accusing defense of merely shifting blame); A.1350-51 (ridiculing defense for making excuses for accounting issues); A.1354-55 (denigrating defense as mischaracterizing evidence).

The prosecution's gratuitous attacks culminated in a summation characterizing Sanders' defense as farcical and attacking counsel for misrepresenting the evidence in order to mislead the jury and engaging in other lawyer gamesmanship. The prosecution's tactics virtually assured that Sanders could not receive a fair trial with this jury. In cases of similar conduct, this Court and its sister appellate judicial departments have consistently granted relief, including ordering a new trial. *See People v. Horton*, 145 A.D.3d 1575, 1576-77 (4th Dep't 2016); *People v. Griffin*, 125 A.D.3d 1509, 1510 (4th Dep't 2015); *People v. Morgan*, 111 A.D.3d 1254, 1255 (4th Dep't 2013); *People v. Gordon*, 50 A.D.3d 821, 822 (2d Dep't 2008); *People v. Tolbert*, 198 A.D.2d 132, 133 (1st Dep't 1993); *People v. Ortiz*, 116 A.D.2d 531, 532 (1st Dep't 1986). So, too, should Sanders' convictions be reversed and vacated.

C. The Prosecution Improperly Vouched for and Bolstered Its Cooperating Witnesses and Injected Personal Beliefs Regarding the Evidence Into Summation.

It is improper, and cause for reversing a conviction, for the prosecution to bolster a witness' testimony or to vouch for the credibility or truthfulness of a witness, *see Nicholas*, 130 A.D.3d at 1318 (3d Dep't 2015); *People v. LaPorte*, 306

A.D.2d 93, 96 (1st Dep't 2003); *People v. Collins*, 12 A.D.3d 33, 37 (1st Dep't 2004); *People v. Smith*, 288 A.D.2d 496, 497 (2d Dep't 2001), as well as for a prosecutor to express his or her personal opinion, or belief, as to the truth or falsity of a witness' testimony or the evidence, *see People v. Bailey*, 58 N.Y.2d 272, 277 (1983); *see also Casanova*, 119 A.D.3d at 976 (3d Dep't 2014); *Collins*, 12 A.D.3d at 37; *Tolbert*, 198 A.D.2d 132, 133 (1st Dep't 1993); *People v. Hansen*, 141 A.D.2d 417, 419 (1st Dep't 1988).

A conviction must be reversed where a prosecutor's misconduct "has caused substantial prejudice to the defendant so that he has been denied due process of law." *People v. Russel*, 307 A.D.2d 385, 386 (3d Dep't 2003) (internal quotation omitted). To determine whether Sanders was denied due process of law, this Court must weigh "the severity and frequency of the conduct, whether the trial court took appropriate action to dilute the effect of the conduct, and whether, from a review of the evidence, it can be said that the result would have been the same absent such conduct." *Id.* (citing *People v. Tarantola*, 178 A.D.2d 768, 770 (3d Dep't 1991)).

The cumulative effect of prosecutorial misconduct leading to substantial prejudice may result in the deprivation of a fair trial requiring reversal. *Casanova*, 119 A.D.3d at 978; *Groysman*, 766 F.3d at 162-63 (finding that the numerous evidentiary errors deeply undermined confidence in the fairness and outcome of the defendant's trial, requiring a new trial); *see also Nicholas*, 130 A.D.3d at 1316

(defendant was deprived of a fair trial as a result of cumulative error from admitting *Molineux* evidence and the prosecution's improper vouching of one of its witnesses). Moreover, "'[t]he right to a fair trial is self-standing and proof of guilt, however overwhelming, can never be permitted to negate this right.'" *People v. Fredrick*, 53 A.D.3d 1088, 1089 (4th Dep't 2008) (cumulative effect of prosecutorial misconduct deprived defendant fundamental right to a fair trial warranting reversal); *see also Abdul-Malik*, 61 A.D.2d at 663-64.

Here, the cumulative effect of the prosecution's misconduct throughout the trial resulted in substantial prejudice and deprived Sanders of his constitutional right to a fair trial. During closing arguments, over defense objection, the trial court permitted the prosecution to comment on the credibility of its own witnesses, *see, e.g.*, A.1341-43, and inject his own personal beliefs regarding the evidence presented at trial, *see, e.g.*, A.1335. This was error. *See Casanova*, 119 A.D.3d at 978-79 (cumulative errors of the prosecutor occurred when he repeatedly declared that his witnesses were honest, credible, and trustworthy). The trial court also failed to provide the jury with any curative instructions immediately following the prosecution's improper remarks, merely stating "this is argument" and the jury's "job is to consider the evidence in the case." A.1338. This was error requiring this Court to reverse and vacate the convictions.

VI. THE TRIAL COURT VIOLATED SANDERS' CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN IT REFUSED TO COMPEL DAVIS TO APPEAR FOR TRIAL, DENIED DEFENSE REQUESTS TO PRESENT EVIDENCE OF DAVIS' DPA AND DENIED REQUESTS FOR APPROPRIATE "MISSING WITNESS" INSTRUCTION.

The trial court violated Sanders' constitutional right to a fair trial when it (1) denied Sanders' request to compel Davis to appear for Trial 2; (2) denied Sanders' requests to present evidence of Davis' "legal history," including acquittals and the DPA, and for a jury instruction regarding same; and (3) denied Sanders' request to issue a "missing witness" instruction. The rulings deprived Sanders the ability to present a defense and were not harmless.

A. Legal Standard.

Although evidentiary rulings are reviewed for an abuse of discretion, *United States v. Nektalov*, 461 F.3d 309, 318 (2d Cir. 2006), errors involving violations of constitutional protections, however, are reviewed under the "harmless beyond a reasonable doubt" standard. *See Chapman*, 386 U.S. at 24. One of the fundamental elements of the constitutional right of due process of law and minimum essentials of a fair trial is the right to present a defense. *People v. Bradley*, 99 A.D. 3d 934, 936 (2d Dep't 2012) (quotation omitted).

B. Davis Was a Material Witness Who Should Have Been Compelled to Appear at Trial 2.

Davis was central to the prosecution's Trial 1 theory of criminal liability. Throughout Trial 1, the prosecution alleged that Davis masterminded the Scheme to

Defraud and other charged conduct. *See* A.954, 957-61, 963, 965-69, 971-75, 992-999. According to the prosecution, Davis not only "sat on top of this scheme and conspiracy, and . . . called the shots," A.963, but was ultimately responsible for the entire fraud, *see, e.g.*, A.975 ("It was not only [Davis'] *firm*; it was his *fraud*.") (emphasis added). Davis was also charged as a co-conspirator and someone who allegedly carried out various overt acts in furtherance of the charged Conspiracy. *See* A.94.

Following Trial 1, on January 8, 2016, the prosecution deferred Davis' prosecution. A.1028-37. Under the DPA, Davis' case would remain on the trial court's docket for 60 months (the "deferment period"), during which time Davis would be required to appear at least annually, if not more often, as directed by the prosecution. A.1512; A.1030 ("with annual or more frequent as necessary appearances"). If Davis fulfilled all terms of the DPA during the deferment period, the prosecution would move to dismiss the indictment against him. A.1030-31. Davis understood, however, that the prosecution held complete and non-reviewable discretion to rescind the DPA at any time, and for any reason. A.1512. Following execution of the DPA, the prosecution permitted Davis to relocate to London. So, while Davis remained singularly *within* the prosecution's control throughout the 60-month deferment period, *see* A.1036-37, he was decidedly *outside* the reach of any defense trial subpoena.

In January 2017, following communications with the prosecution regarding Sanders' request to compel Davis' appearance at Trial 2, Davis' counsel advised Sanders' counsel that he would not accept a defense trial subpoena for his client. A.1088. At a hearing on January 31, 2017, the prosecution rejected a request to compel Davis to appear in court for a status conference, A.1088, and the trial court declined to compel the prosecution to require Davis to return and appear at Trial 2.

At Trial 2, the trial court placed no restrictions on the prosecution's ability to reference Davis, or raise inferences of his misconduct or alleged collaboration with Sanders in executing on the scheme and conspiracy. The prosecution repeatedly referred to Davis as a co-conspirator, a criminal enabler who was fully aware of Sanders' alleged criminal misconduct, as someone who rubberstamped Sanders' purportedly exorbitant salary and bonus facilitating Sanders' alleged larceny, and as someone who directed Sanders to "do whatever means necessary" to enable the firm to meet its covenants. *See, e.g.*, A.1094, 1097, 1099-1101, 1103, 1105-1108. Davis was a critical witness who, regardless of whether he provided favorable testimony to the prosecution, defense or both, should have been compelled to testify at Trial 2. The prosecution's strategy of effectively trying Davis *in absentia*—repeatedly invoking Davis' role as a criminal mastermind and co-conspirator—left Sanders with no way to rebut the prosecution's inferences and insinuations, short of testifying in his own defense.

On March 3, 2017, given the prosecution's repeated reference to Davis' bad conduct in collaboration with Sanders, Sanders again requested that the prosecution compel Davis to return to New York to be served with a trial subpoena. A.1161-62. The prosecution refused to do so, *see* A.1162, and even represented (erroneously) that Davis was not within the prosecution's control, *see* A.1162. Indeed, just one year before, the *prosecution and the trial judge* admonished Davis that he remained under the prosecution's control for the full 60-month deferment period. A.1030, 1033, 1036-37. The trial court declined, once again, to compel Davis' appearance, depriving Sanders his ability to present a full defense and forcing Sanders to choose between testifying in his own defense in order to rebut the prosecution's unfounded charges, or allowing the prosecution's wild accusations to go unchecked. The prosecution, with the trial court, also impeded Sanders from presenting evidence that might directly contradict the prosecution's theory of liability at Trial 2, including dozens of references to Davis' role as a mastermind of the charged conduct. Consequently, Sanders was impeded in his ability to present his defense.

C. The Trial Court Abused Its Discretion When It Denied Sanders' Request to Present Evidence of Davis' DPA and "Legal History" and for A Jury Instruction.

The trial court abused its discretion when it denied Sanders' request to introduce Davis' "legal history," A.1169-70, particularly in light of the prosecution's pervasive reference to Davis' criminal involvement and collusion with Sanders.

Had Davis been compelled to appear at Trial 2, his "legal history," including his acquittals, and the fact and terms of his DPA would have been entirely appropriate topics for examination. Davis' conspicuous absence as a Trial 2 witness left the jury with the misimpression that Sanders' conduct justified prosecution while Davis' did not and leaving Sanders with no ability to rebut the prosecution's charges of collusion. The trial court's rote balancing test and failure to properly consider Sanders rights deprived him the ability to present an effective defense.

The trial court erred when it denied Sanders the opportunity to examine other witnesses, including Canellas, about their knowledge, awareness and impact of Davis' acquittals and DPA, A.1169-70, while, at the same time, giving the prosecution unfettered license to introduce evidence of Davis' involvement in the charged conduct. Importantly, Sanders was precluded from examining Canellas' knowledge of Davis' DPA, its impact on Canellas' renegotiated plea and cooperation agreement, the extent to which Canellas may have been motivated to provide false or colored testimony in order to conform to the prosecution's trial narrative, and any other biases Canellas harbored against Sanders.

It is axiomatic that "[c]ross-examination is the greatest legal engine ever invented for the discovery of the truth." *Lilly v. Virginia*, 527 U.S. 116 (1999). "Bias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or

otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant." *United States v. Abel*, 469 U.S. 45, 52 (1984).

Although the scope of a defendant's right to introduce evidence of bias or motive to lie is not without limits, it is rarely proper to cut off or limit an inquiry that bears on a feasible defense. *See Alford v. United States*, 282 U.S. 687, 694 (1931). This is particularly true where, as here, the examination was focused on demonstrating "that a witness who has testified against him either favored the prosecution or was hostile to the defendant." *United States v. Harvey*, 547 F.2d 720, 722-23 (2d Cir. 1972). In such cases, "[e]vidence of all facts and circumstances which 'tend to show that a witness may shade his testimony for the purpose of helping to establish one side of a cause only,' should be received." *Id.*

The trial court erred in denying Sanders the opportunity to robustly cross-examine Canellas regarding the Davis DPA given that his demand to withdraw his guilty plea and renegotiate his plea agreement came not only *after* the trial court dismissed the Grand Larceny counts but *after* he learned of the Davis DPA. A trial court's denial of testimony is reviewed for abuse of discretion. *People v. Nazario*, 100 A.D.3d 783, 784 (2d Dep't 2012). When the denial implicates the constitutional rights of a criminal defendant to confront witnesses against him, however, the constitutional error can only be deemed harmless beyond a reasonable doubt when

the evidence of guilt is otherwise overwhelming and there is no reasonable possibility that the error contributed to the conviction. *People v. DeRaffele*, 54 Misc. 3d 1, 2016 N.Y. Slip Op. 26304, at *5-*6 (2d Dep't 2016) (trial court discretion to manage proceedings is necessarily constrained by a defendant's constitutional right to present a defense).

Canellas' testimony as an alleged "accomplice" of Sanders was already inherently suspect. He had been granted the highly unusual opportunity to withdraw his guilty plea and renegotiate the terms of his new cooperation agreement. A.231-258. Additionally, as the prosecution's indispensable "cooperating" witness, Canellas had an obvious personal stake in the outcome of the trial, which was at risk given the multiple contradictions between Canellas' testimony and the testimony of other "cooperating" witnesses discussed above, and Canellas' admitted effort to alter his testimony over time to conform to the prosecution's trial narrative, A.856, 864, 870, 893-94—a point punctuated by Canellas' post-trial recantation discussed below in Issue XIII—and all were appropriate for cross-examination. *See United States v. Padgent*, 432 F.2d 701, 704-05 (2d Cir. 1970). The need to explore bias and motive to lie, alter or fabricate testimony to align with the prosecution's theory of the case could not be more pronounced than with Canellas. The trial court's ruling denying Sanders the ability to examine Canellas about whether and to what extent the DPA prompted Canellas to demand a renegotiated plea and cooperation agreement,

deprived Sanders the ability to fully and effectively test through the crucible of cross-examination the depth of Canellas' biases and motives to lie, violated Sanders' right of confrontation, and constituted reversible error. *See United States v. Martin,* 618 F.3d 705, 725-31 (7th Cir. 2010) (finding violation of the right to confrontation where court barred cross-examination into a separate area of bias apart from the witnesses' plea agreement and prior convictions).

The trial court also erred when it denied the defense application for a jury instruction regarding Davis' "legal history" and DPA. The refusal to do so prejudiced Sanders by leaving the jury with the solid impression from the prosecution argument and evidence that Davis collaborated and colluded with Sanders, and that, despite Davis' alleged central role in the criminal conduct, Sanders was somehow more culpable and worthy of prosecution than Davis. The ruling prejudiced Sanders by denying him the ability to answer the prosecution's misleading narrative at trial without being compelled to testify in his own defense.

D. The Trial Court Erred When It Denied Sanders' Request for a Missing Witness Charge.

The trial court erred when it denied Sanders' request for a "missing witness" charge as to Davis. A court's decision on whether or not to grant a party's request for a missing witness charge is reviewed for an abuse of discretion. *People v. Oniya*, 70 A.D.3d 1202, 1204 (3d Dep't 2010). A party is entitled to a missing witness charge upon establishing that "the opposing party has failed to call a witness who

could be expected to have knowledge regarding a material issue in the case and to provide testimony favorable to the opposing party." *People v. Gonzalez*, 68 N.Y.2d 424, 427 (1986); *see also People v. Davydov*, 144 A.D.3d 1170, 1172-73 (2d Dep't 2016). The burden then shifts to the opposing party to "account for the witness's absence or to show that the charge would be inappropriate." *People v. Mickewitz*, 236 A.D.2d 793, 793 (4th Dep't 1997) (citing *Gonzalez*, 68 N.Y.2d at 428). This burden can be met by demonstrating that the "witness is not knowledgeable about the issue, that the issue is not material or relevant, the testimony would be cumulative to other evidence, that the witness is not 'available', or that the witness is not under the party's 'control' such that he would not be expected to testify in his or her favor." *Gonzalez*, 68 N.Y.2d at 428.

Sanders first requested Davis' presence at Trial 2 on January 31, 2017. A.1088. The defense made a request for a "missing witness" instruction on April 21, 2017, A.1322-23, which the trial court denied citing *Gonzales*, 68 N.Y.2d at 427. The trial court ruled that Davis was unavailable due to his overseas residency and the purported likelihood that Davis would invoke his Fifth Amendment right against self-incrimination—an unverified assumption based entirely on the representation of the lead prosecutor. The trial court further held that Davis was not within the prosecution's "control," and that Davis would be more likely to have interests aligned with the defense, based solely on his role as a co-defendant in Trial 1 and

the prosecution's Trial 2 theme of accomplice and co-conspirator liability. A.1322-23. The trial court's ruling was an abuse of discretion. Sanders satisfies all prerequisites for a missing witness charge.

1. Given His Trial 1 Strategy and DPA, and the Prosecution's In-Court Proffer, Davis Would Be Expected to Have Knowledge Regarding All Material Issues in the Case and to Provide at Least Some Testimony Favorable to the Prosecution.

According to the prosecution, Davis was a ring-leader, mastermind, shot-caller and coordinator of all matters relating to the scheme to defraud. *See*, *e.g.*, A.94, A.1094, 1097, 1099-1101, 1103, 1105-08, 1334, 1336, 1345-47, 1349. It is indisputable that Davis had knowledge that was material and not cumulative, as the prosecution found him to be an "integral and necessary part" of the charged conduct, A.1334, and someone who helped Sanders operate the firm, A.1349.

At Trial 1, Davis' counsel attempted to distance Davis from, and deflect culpability onto, Sanders. *See* A.761-62, 880-892. It was likely, then, that Davis would provide testimony and evidence favorable *to the prosecution* if given the opportunity, if only to deflect knowledge and culpability onto Sanders. This is true even if Davis also would provide testimony rebutting or calling into question some material aspects of the prosecution's case, or that was otherwise favorable to Sanders.

2. The Prosecution Could Not Adequately Account for Davis' Absence or Demonstrate That the Charge Would Be Inappropriate.

Davis was "available" and under the prosecution's "control." "Availability" refers to a party's ability to produce the subject witness. *Gonzalez*, 68 N.Y.2d at 428. If the opposing party demonstrates that the subject witness' whereabouts are unknown after diligent efforts to find him or her were unsuccessful, or that the witness is ill or incapacitated, the missing witness charge should not be given. *Id.* Additionally, a witness who on Fifth Amendment grounds refuses to testify may be considered "unavailable." *People v. Savinon*, 100 N.Y.2d 192, 198, (2003). "A court should, however, be reasonably sure that the witness will in fact invoke the privilege, and where there is doubt the witness should be brought before the court and asked the relevant questions." *Id.* at 198, n.7.

The prosecution knew of and even permitted Davis' to relocate to London following his DPA. The DPA required Davis to report back and appear at least annually, but more frequently as directed by the prosecution. A.1029-1030; *see also* A.1512. The case would remain on the trial court's docket for the full deferment period "with annual or more frequent as necessary appearances." A.1030, 1032-33. Thus, Davis was available to testify as a witness during Trial 2, despite the prosecution denying that it had no ability to call him back. A.1088.

It is also not clearly established that Davis would have invoked his Fifth Amendment privilege against self-incrimination. After communicating with Davis' counsel prior to the trial court rejecting the defense motion for a "missing witness" charge, the prosecution (not Davis' counsel) represented to the trial court that Davis would invoke his Fifth Amendment privilege against self-incrimination if compelled to return to trial. A.1323. Davis' invocation of his Fifth Amendment right may, if true, render him "unavailable" to the defense, *see People v. Comfort*, 151 A.D.2d 1019, 1020 (4th Dep't 1989). But, the prosecution's unsupported assertion that Davis *may* invoke his Fifth Amendment rights was insufficient to rebut Sanders' showing of his availability. *See Savinon*, 100 N.Y.2d at 200 (if unavailability could be established by an unsupported assertion, a witness would be free to decline the request to testify and serve a party's ulterior goal of keeping the witness off the stand). The trial court conducted no further inquiry on this point and never confirmed Davis' intent directly with his counsel, instead relying on the prosecution's self-serving and unverified statement. Further, the trial court failed to inquire about nature of the preceding discussions with the prosecution, nor did it compel the prosecution to disclose the full sum and substance of any and all communications between the prosecution and Davis' counsel. Accordingly, the prosecution failed to establish that Davis was truly unavailable for Trial 2.

Davis was also undoubtedly under the prosecution's "control." If a witness is "favorable to or under the influence of one party and hostile to the other, the witness is said to be in the 'control' of the party to whom he is favorably disposed." *Gonzalez*, 68 N.Y.2d at 429. As discussed above, based on his Trial 1 strategy distancing himself from, and deflecting culpability onto, Sanders, *see* A.761-62; *see also* A.882, 891-892, Davis would just as likely be hostile to Sanders given the ease with which the prosecution could rescind the DPA. At bottom, the trial court's failure to inquire further and exercise diligence left unanswered questions and deprived Sanders his right to a fair trial. In light of the less than overwhelming evidence of Sanders' guilt—as seen in the numerous evidentiary and other errors discussed above and below—the trial court's error was not harmless. *See Mickewitz*, 236 A.D.2d at 793.

VII. THE PROSECUTION VIOLATED SANDERS' DUE PROCESS RIGHTS BY FAILING TO DISCLOSE WITNESS INTERVIEW STATEMENTS, AND BY FAILING TO DISCLOSE EXCULPATORY EVIDENCE, INCLUDING INCONSISTENT WITNESS STATEMENTS AND OTHER IMPEACHMENT EVIDENCE.

The prosecution failed to turn over a single witness interview note, report or memo for the interviews conducted with key prosecution witnesses after Trial 1 and in advance of Trial 2 in violation of *People v. Rosario* and C.P.L. § 240.45(1)(a). Even if, as the prosecution contends, it did not memorialize the dozens of post-Trial 1 witness interviews, the prosecution nonetheless violated its federal and state

constitutional duties to disclose exculpatory evidence as recognized by *Brady v. Maryland*, 373 U.S. 83 (1963). The prosecution also failed to disclose inconsistent witness statements and impeachment evidence that would reveal the "cooperating" witnesses' biases and motives to shade or color their testimony to conform to the prosecution's trial narrative, all of which are required by *Giglio v. United States*, 405 U.S. 150 (1972). The trial court erred by facilitating the prosecution's misconduct, depriving Sanders the ability to adequately prepare for cross-examination of all key prosecution witnesses. This Court should reverse and vacate Sanders' convictions.[24]

A. Legal Standard Under *People v. Rosario* and C.P.L. § 240.45(1)(A).

"'[A] defendant is entitled to inspect any statement made by the Government's witness which bears on the subject matter of the witness's testimony.'" *People v. Rosario*, 9 N.Y.2d at 289 (quoting *Jencks v. United States*, 353 U.S. 657, 67-68 (1957)). C.P.L. § 240.45(1) likewise requires the prosecution to produce any written or recorded statement made by any person the prosecutor intends to call as a witness at trial, which relates to the subject matter of that witness' testimony. So long as the witness' prior statement—regardless of whether this statement wavers from his testimony—relates to the subject matter of the witness' testimony, justice entitles the defense to examine it. *Rosario*, 9 N.Y.2d at 289. A witness' pretrial statement

[24] C.P.L. § 440.10(1)(h) authorizes a court to vacate a judgment obtained in violation of an accused's constitutional rights.

is not only valuable as a source of contradiction; it also may reflect a witness' bias, or otherwise supply the defense with knowledge on how to neutralize the witness' damaging testimony. *Id*. Accordingly, the defense is entitled to "the benefit of any information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence." *Id.* at 290 (internal citations omitted).

The prosecution's obligation to produce such evidence to the defense is ongoing and continuous throughout the trial process. *See People v. Lebovits*, 94 A.D.3d 1146, 1147-49 (2d Dep't 2012) (the "untimely disclosure of the interview notes precluded the defense from fully and adequately preparing for cross-examination and set a trap for the defendant which had already sprung at the time the notes were finally furnished."). On appeal, a defendant must establish that "there is a reasonable possibility that the [prosecutor's] non-disclosure [according to C.P.L. § 240.44 and § 240.55(a)] contributed to the result of the trial . . . ." C.P.L. § 240.75; *see also People v. Delosanto*, 300 A.D.2d 408 (2d Dep't 2002).

B. The Prosecution Violated Its Constitutional and Statutory Duties By Failing to Disclose Post-Trial 1 Witness Interview Notes, Memos, or Reports of Its "Cooperating" Witnesses.

1. Despite its Consistent Practice, the Prosecution Failed to Disclose *Rosario* Material.

The prosecution generally has no affirmative obligation to create written work product for the sole purpose of disclosing those written materials to the defense.

Before Trial 1, however, the prosecution produced notes and reports of interviews for close to 100 people, including notes and reports of multiple interviews of "cooperating" witnesses who were former members of Dewey's finance department.[25] The prosecution's contention that it did not memorialize any post-Trial 1 witness interviews is not credible based on this consistent past practice, as well as evidence adduced at Trial 2 strongly suggesting the prosecution did, in fact, create notes, memos or reports but failed to meet its obligation and misrepresented its actions to the trial court.

To illustrate, Canellas, the prosecution's indispensable "cooperating" witness, attended between 5 and 10 post-Trial 1 meetings with the prosecution, with some meetings lasting up to 8 hours in duration. A.1206-17, A.1222-23. These meetings occurred after Canellas was afforded the highly unusual opportunity to withdraw his prior guilty plea to a Grand Larceny charge, and enter into a renegotiated plea and cooperation agreement to a lesser charge and reduced sentence recommendation by the prosecution. A.251-54. This further followed Canellas' discovery of the Davis

[25] Each "cooperating" witness ultimately acknowledged engaging in misconduct and having a criminal state of mind only after facing the threat of prosecution on more serious charges. *See*, *e.g.*, A.763, 783, 793-94, 851-54, 897, 901, 905. Each "cooperating" witness later confirmed at Trial 1 the "evolution" of testimony that ultimately conformed to the prosecution's narrative of the case. A.763 (Mullikin); A.783 (D. Rodriguez); A.793-94 (Alter); A.897 (Harrington); A.901 (L. Rodriguez); and A.905 (Cascino).

DPA, which also prompted a series of discussions culminating in his renegotiated plea. And, while some email communications between the prosecution, on the one hand, and Canellas and/or his counsel, on the other hand were produced—over the prosecution's strenuous objection—none of the notes and memos of the 5-10 meetings with the prosecution were disclosed.

In addition, the prosecution team met with Cascino up to four times, *see* A.1239-41, and Harrington approximately four times, A.1296-97. Mullikin, on the other hand, had approximately six meetings and interviews with the prosecutors *after* Trial 1, *see* A.1279-80, in addition to the ten meetings and interviews *prior* to Trial 1, *see* A.780. During these post-Trial 1 interviews, prosecutors questioned Mullikin about entirely new material, including emails that were later brought out during his cross-examination at Trial 2. A.1279-80.

It is inconceivable given the prosecution's long-standing practice and demonstrated proclivity prior to Trial 1 to memorialize interviews and meetings with witnesses, especially key cooperating witnesses, that it created not a single written note, report or memo during the dozens of post-Trial 1 interviews. This is further suspect given that the prosecution and its investigators were observed during the interviews with pens, paper and laptops out for the purpose of taking notes and memorializing the discussion. At least one witness (Cascino) expressly recalled that some members of the prosecution team (notably ADA Peirce Moser) and

investigators conspicuously held pens in their hands while others used laptops during her interviews. A.1239-41.

The trial court erred in failing to conduct a more searching and probing inquiry and, consequently, deprived Sanders key *Rosario* material, thereby obstructing his ability to effectively prepare for cross examination of prosecution witnesses. Such *Rosario* material concerned indispensable prosecution witnesses such as Canellas. It stands that his post-Trial 1 interviews not only likely yielded *Rosario* material, but that such material would have critically undercut the prosecution's narrative. As such, its non-disclosure materially contributed to Sanders' conviction.

2. Well in Advance of Trial 2, During a Witness Interview of One of Its "Cooperating" Witnesses, the Prosecution Learned of New Misconduct and Impeachment Material Contradicting Prior Testimony But Failed to Disclose it to the Defense.

Months before Trial 2, at least one "cooperating" witness—Cascino—disclosed to the prosecution new information regarding additional fraudulent conduct by her. *See* A.1234-35; *see also* A.1484-86, 1490-91. In particular, Cascino admitted that she whited out account information *for the express purpose of deceiving Dewey's auditors*. A.1247-48 (emphasis added). Cascino, who also testified that the prosecutors and investigators in her post-Trial 1 interviews held pens and paper and used laptops, revealed this new fraudulent conduct to the prosecution during one or more of these post-Trial 1 meetings. Her revelation contradicted her Trial 1 testimony that she never intended to defraud anyone.

A.1249-50. Not a single interview report prior to Trial 1 contained any reference to Cascino admitting to manipulating entries on the collection morning report, or doing so for the express purpose of deceiving the auditors. A.1237. And, there was no evidence that Cascino carried out this deceptive conduct at Sanders' direction.

Cascino admitted she disclosed this information to the prosecution "a few months" before Trial 2, A.1247, had not previously disclosed this information prior to Trial 1, nor did she testify about it at Trial 1 because the prosecution did not ask her specifically about that fraud. A.1247. ("If they didn't ask me I did not testify."). The defense learned about this impeachment evidence for the first time during Cascino's direct examination at Trial 2. A.1237. It is inconceivable that the prosecution did not, as it claimed, memorialize this new information in a witness interview memo or report; the prosecution had incorporated a line of questions into its examination outline, and was prepared to examine Cascino about it at Trial 2. A.1234-35. The prosecution failed to disclose this information to the defense without justification which deprived Sanders of critical information for cross-examining Cascino and materially contributed to Sanders' conviction.

3. <u>The Prosecution Interviewed *New* Witnesses Who Had Not Previously Testified at Trial.</u>

The prosecution also conducted interviews of *new* witnesses that had not testified at Trial 1, but would ultimately testify at Trial 2, including Derek Smith, a former Dewey partner. *See* A.1138-1160. No notes of his interview(s) were ever

disclosed. It is unlikely the prosecution would meet with a witness for the first time in preparation for Trial 2, having not called him at Trial 1, and not take a single note, or prepare a report or memo – particularly given its consistent practice of doing so in preparation for Trial 1.

Given the high likelihood that the prosecution did, in fact, create at least some written record of its meetings with the "cooperating" witnesses, but failed to disclose them to the defense, Sanders has been substantially prejudiced. The prosecution's failure to turn over its interview notes and reports violated its obligations under *Rosario* and C.P.L. § 240.45(1)(a). Further, the failure of the trial court to conduct a searching inquiry, or an evidentiary hearing, rather than simply accept the prosecution's representation, was error and deprived Sanders of his right to a fair trial. Sanders' convictions must be reversed and vacated on this basis alone.

C. The Prosecution Failed to Disclose Under *Brady* and *Giglio* Exculpatory Evidence, Inconsistent Witness Statements and Other Impeachment Evidence.

The prosecution also had a continuing obligation under *Brady*, 373 U.S. 83 (1963), and *Giglio*, 405 U.S. 150 (1972) which it violated. To demonstrate a *Brady* violation, a defendant must show that: (1) the prosecution failed, whether willfully or inadvertently, to disclose evidence in its possession, (2) the evidence was favorable to the defense, and (3) the failure to disclose resulted in prejudice. *See Stickler v. Greene*, 527 U.S. 263, 281-82 (1999); *People v. Scott*, 88 N.Y.2d 888,

890 (1996). A *Brady* violation, therefore, occurs when the prosecution fails to timely disclose all exculpatory and material evidence, including evidence to challenge the credibility of a crucial prosecution witness or the existence of a cooperation agreement between the prosecution and a witness, as an inducement for that witness' testimony. *People v. Johnson*, 107 A.D.3d 1161, 1165 (3d Dep't 2013).

To establish prejudice under *Brady*, there must be a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). Indeed, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* at 434. Sanders satisfies each element.

1. <u>The Prosecution Failed to Disclose Cascino's "New Information" Regarding Her Efforts to "Deceive" Dewey's Auditors.</u>

There is no dispute that the prosecution failed to disclose Cascino's deception of the Firm's auditors, despite having this information for months prior to trial. *See, e.g.*, A.1234-35, 1246-47. It is equally clear that this evidence was "favorable" to the defense. The evidence and any reasonable inferences to be drawn could have

been used to a greater extent to impeach Cascino's credibility and expose her biases. The prosecution thus violated *Brady* and *Giglio*. *See, e.g.*, *United States v. Coppa*, 267 F.3d 132, 139 (2d Cir. 2001) (citing *Giglio*, 405 U.S. at 154) ("Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness."); *see also Youngblood v. West Virginia*, 126 S. Ct. 2188, 2190 (2006). Further, the prosecution violated its duty by failing to exercise due diligence in learning of such favorable evidence from one or more "cooperating" witnesses, including Cascino, who were effectively acting on behalf of the government. *See Kyles*, 514 U.S. at 437 (prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf).

The prosecution's failure to disclose Cascino's information and the statements of other prosecution witnesses deprived Sanders the opportunity to adequately prepare for cross-examination. A.1251-53; *See Lebovits*, 94 A.D.3d at 1147. This is paradigmatic *Brady* and *Giglio* evidence. *See Kyles*, 514 U.S. at 446-47 (granting relief based on undisclosed evidence that would have thrown into doubt the good faith and reliability of the police investigation); *Bowen v. Maynard*, 779 F.2d 593, 613 (10th Cir. 1986) ("A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such in assessing a possible *Brady* violation.")

2. The Trial Court Erred When It Failed to Conduct a Searching Inquiry Challenging the Prosecution's Clear Violations of *Brady* and *Giglio* and Its Suppression of Cascino's and Other Exculpatory Evidence Not Known to the Defense.

The suppressed Cascino evidence is likely just the tip of the iceberg. The trial court had an obligation to inquire about and conduct an appropriate inquiry of the prosecution's discovery violations—violations hinted at by the evidence adduced at Trial 2. The trial court erred when it failed to conduct a reasonably searching inquiry regarding the prosecution's failure to disclose *Rosario, Brady* and *Giglio* evidence, the prosecution's decision to not disclose Cascino's testimony until trial, or to document any of its witness' statements before Trial 2. A reasonable probability exists that this nondisclosure contributed to Sanders' conviction, as the defense was precluded from adequately preparing for each witness' cross-examination. *Lebovits*, 94 A.D.3d at 1149. For these reasons, the error was not harmless and this Court should reverse and vacate Sanders' conviction and dismiss the indictment. *See United States v. Kohan*, 806 F.2d 18, 22 (2d Cir. 1986).

3. The Prosecution Violated Its Constitutional and Statutory Duties When It Failed to Disclose Its Written Communications and the Substance of Any Oral Communications With Davis and His Attorney Regarding the Circumstances of His DPA.

It is well-settled that a defendant is entitled to present a central theory of his defense to the jury, and restricting him from doing so is not harmless error. *See United States v. Reindeau*, 947 F.2d 32, 36 (2d Cir. 1991); *United States v. Harris*,

733 F.2d 994, 1005 (2d Cir. 1984). Additionally, a conviction must be vacated and new trial ordered where a defendant's right to present innocent state of mind defenses has been impeded or violated. *See United States v. Biaggi*, 909 F.2d 662, 692 (2d Cir. 1990); *United States v. Detrich*, 865 F.2d 17, 21 (2d Cir. 1988).

Sanders' lack of criminal intent was a central defense theory. The prosecution's *Brady* and *Giglio* obligations to produce exculpatory evidence and impeachment evidence existed irrespective of any formal written demand from the defense. The prosecution disclosed no post-Trial 1 written or oral communications with Davis or his counsel regarding Davis' DPA. The circumstances of Davis' DPA, and conditions of his compliance, all of which resulted in Davis being outside the reach of a defense trial subpoena, were discoverable. The defense also was entitled to explore Davis' communications with the prosecution regarding the unusual decision to simply defer Davis' prosecution rather than require him to testify for the prosecution. As discussed above under Issue VI, the prosecution's Trial 2 narrative was replete with references to Davis as a central and controlling figure in the charged Scheme to Defraud and Conspiracy. Yet, the trial court failed to direct the prosecution to disclose all communications, both oral and written, between the prosecution, on the one hand, and Davis and/or his counsel, on the other, regarding post-Trial 1 discussions and negotiations about the DPA. Such failure prejudiced Sanders, violated his due process rights and constituted error that was not harmless.

4. The Prosecution Violated Its Constitutional and Statutory Duties When It Failed to Disclose Its Written Communications and Oral Communications With Canellas or His Counsel Relating to the Impact and Implications of Davis' DPA on Canellas' Decision to Seek Reconsideration.

The prosecution failed to disclose its communications with Canellas regarding the Davis DPA, and the trial court erred when it failed to compel the prosecution to disclose such communications. Consequently, Sanders was unable to fully explore the depth of Canellas' motivation to renegotiate his plea deal and testify in accordance with the prosecution's narrative. The trial court further erred when it denied Sanders' request to cross examine Canellas regarding the Davis DPA and the effect of that DPA on Canellas' renegotiation of his plea agreement which, as discussed above, must be disclosed if it bears on Canellas' motivations to testify falsely as he did, or his prejudices and biases.

Discoverability of information is necessarily broader than admissibility. Even if the trial court would have ultimately excluded the communications between the prosecution and Canellas regarding Davis' DPA as not relevant, Sanders' right to the discovery of same has been violated, as has his counsel's ability to assess and craft argument advocating for the admissibility of that information. Moreover, the communications in question were central to the prosecution's trial evidence and impeachment of its witness testimony, particularly as it bears on the self-serving

motivations of a central witness to the prosecution with significant credibility issues as Canellas. All such evidence should have been produced under *Brady* and *Giglio*.

The prosecution's failure to disclose such evidence, and the trial court's failure to compel its disclosure or permit Sanders to question Canellas about the Davis DPA at Trial 2, deprived Sanders the ability to fully and effectively cross-examine Canellas and other witnesses. This failure materially contributed to, and undermines confidence in, Sanders' conviction and, as such, compels that Sanders' conviction must be reversed and vacated.

VIII. THE TRIAL COURT ERRED WHEN IT PERMITTED TESTIMONY ON AN ULTIMATE ISSUE OF FACT AND SUBMITTED A QUESTION OF COMPLEX FEDERAL TAX LAW TO THE JURY.

The trial court erred when, over Sanders objection, A.158-60, A.181, it permitted the prosecution's "cooperating" and other fact witnesses to opine on and testify about an ultimate fact issue: the truth/falsity and legitimacy/illegitimacy of certain accounting treatment methodologies allegedly employed by Dewey's finance and accounting departments at the direction of Sanders. The introduction of such evidence encroached on the jury's fact-finding province and deprived Sanders his constitutional right to a fair trial and to a fair and impartial jury. The trial court further erred when it permitted the prosecution to present to the jury for determination complex issues of whether Sanders' conduct, or those that he directed,

violated federal tax law. These erroneous evidentiary rulings deprived Sanders his constitutional right to a fair trial.

A. The Trial Court Usurped the Jury's Fact-Finding Province by Permitting the Prosecution to Present Lay Witness Testimony on an Ultimate Issue of Fact.

1. Legal Standard.

Admission of ultimate fact evidence by a lay witness constitutes error that, if not deemed harmless, constitutes *reversible* error. *See People v. Goodwine*, 177 A.D.2d 708, 709 (2d Dep't 1991). The "essential role of the jury in our system of justice is to resolve disputes of fact by assessing and weighing the evidence at trial, and to determine the credibility of witnesses." *People ex rel. DeMauro v. Gavin*, 92 N.Y.2d 963, 964 (1998). Lay witnesses testifying for either party may not preempt the fact-finding role of the jury. A lay witness' testimony must be confined to those facts within his or her personal knowledge and must exclude conclusions or opinions. *People v. Miller*, 96 A.D.3d 1451, 1452 (4th Dep't 2012). Such opinion invades the exclusive fact-finding province of the jury, and the admission of such testimony is erroneous. *People v. Jones*, 51 A.D.3d 690, 692 (2d. Dep't 2008).

A lay witness may only testify in the form of an opinion or inference that embraces an ultimate issue to be decided by the jury when: "(a) the testimony is rationally based on the witness' personal perception; (b) is within the ambit of common experience or that of a particular witness; and (c) would be helpful to the

finder of fact in understanding the witness' testimony or in determining a fact in issue, especially when facts cannot be stated or described in such a manner as to enable the finder of fact to form an accurate judgment about the subject matter of the opinion or inference." N.Y.R. Evid. 7.03 ("Opinion of Lay Witness"). The prosecution failed to establish the testimony of its cooperating witnesses met these requirements.

2. The Trial Court Permitted the Prosecution to Elicit Testimony From its Non-expert "Cooperating" Witnesses on the Ultimate Issue of Whether Accounting Adjustments and Entries Were False, Improper, Illegitimate, and Inappropriate.

At Trial 2, the prosecution elicited testimony on an ultimate issue from its own "cooperating" witnesses who were not qualified to provide any such opinion. Canellas, Mullikin, Harrington and Alter opined that the accounting treatment, adjustments, and amortizations, among other entries, were "false" and/or not legitimate, and that misrepresentations were made to support the alleged scheme to defraud investors and banking institutions. *See, e.g.*, *Canellas Examination* – A.1177 (questioning on legitimacy and falsehood of adjustments); A.1178 (conceding illegitimacy of some adjustments); A.1179 (illegitimate accounting entry discussion); A.1180 (falsehood of accounting entries); A.1186 (same); A.1200 (falsehood of adjustments to books); A.1201 false accounting statement discussion); *Mullikin Examination* – A.1254 (inquiry about criminal conduct involving false accounting procedures); A.1270.1 (direction to make false adjustments); A.1278.1

(inquiry about making false entries in accounting system); *Harrington Examination* – A.1283 (false and incorrect journal entries); A.1277 (false entries in accounting system); *Alter Examination* – A. 1297.10 (improper and inappropriate budgeting and accounting procedures). Such testimony improperly encroached on the jury fact-finding province, and was further not rationally based on their own personal perceptions.

Nor were questions of whether accounting entries and adjustments were false, improper, illegitimate or inappropriate within the ambit or experience of Canellas, Mullikin or Alter. The questions posed required expert knowledge and were not appropriate for conclusory testimony from the prosecution's lay witnesses. The prosecution even conceded that its lay witnesses did not have the expertise to answer questions about accounting adjustments. *See, e.g.*, A.1297.18. The accounting adjustments were fully capable of description, but not by lay witnesses who are not qualified to render an expert opinion.

Ultimately, the testimony of the prosecution's lay witnesses confused the issues for the jury as well as its understanding of its own role as a finder of fact which, in turn, prevented the jury from fulfilling that role. The trial court abused its discretion in permitting the prosecution to encroach on the jury's province which deprived Sanders of a fair trial. *See Jones*, 51 A.D.3d at 692 (the detectives' improper opinion testimony, in combination with the additional evidentiary errors,

served to deprive the defendant of a fair trial). This error permeated the trial and serves as the crux of the evidence against Sanders. *See, e.g.*, A.1334.1-1334.2. Sanders' conviction must be reversed and vacated.

B. The Trial Court Improperly Presented Questions of Complex Federal Tax Law to the Jury for Determination.

1. Legal Standard.

It is axiomatic that the trial court, and not the jury, determines questions of law. *People v. Mager*, 25 A.D.2d 363, 365 (2d Dep't 1966). Especially in criminal cases, it is improper to instruct the jury to decide questions of law, as "the jury is bound by the court's instructions on those questions." *See id.*; *People v. Medina*, 146 A.D.2d 344, 351 (1st Dep't 1989). The jury's role is to decide the questions of fact, not rules of law. *People v. Graham*, 55 N.Y.2d 144, 152 (1982); *see also Medina*, 146 A.D.2d at 350. Even if evidence may be relevant, it is not necessarily admissible if "its probative value is outweighed by the danger that its admission would . . . confuse the main issue and mislead the jury; or unfairly surprise a party; or create substantial danger of undue prejudice to one of the parties." *People v. Petty*, 7 N.Y.3d 277, 286 (2006) (citing *People v. Davis*, 43 N.Y.2d 17, 27 (1977); *People v. Corby*, 6 N.Y.3d 231, 234-35 (2005)).

2. The Trial Court Abused Its Discretion When It Permitted the Prosecution to Present Complex Questions of Federal Tax Law to the Jury.

On May 31, 2016, Sanders moved *in limine* to preclude the prosecution from introducing evidence on questions of federal tax law. *See, e.g.*, A.139-146. Sanders again objected to introduction of this evidence on February 13 and 15, 2017. On April 29, 2017, Sanders moved to exclude testimony of the prosecution's tax expert, Joseph Bailey, on grounds that his anticipated testimony regarding accounting rules and tax treatment would only serve to confuse the jury and would be unduly prejudicial. A.1311-12. The trial court denied Sanders' motions and permitted the prosecution to introduce evidence regarding complex questions of federal tax law. A.1312, 1317-20.

At the close of the prosecution's case, Sanders again moved to strike Bailey's testimony, which contradicted the testimony of another prosecution expert, *compare* A.1319.1-1320 (Bailey) *with* A.1160.1-1160.12 (Weichholz), and to exclude evidence relating to the complex *legal* issue of federal tax law, *see* A.1324-25. The trial court denied the motion, leaving the jury in the impermissible position of ultimately determining federal tax law—an issue on which the prosecution's own experts could not agree. The trial court further erred and prejudiced Sanders when, despite the confusion caused by inconsistent testimony from the prosecution's own experts, it denied Sanders' request to introduce the federal regulation requiring

amortization of costs associated with facilitating a merger that could have helped clarify any confusion among the jury. A.1160.12-1160.14. Finally, the trial court denied Sanders' suggested proposed curative instructions on the issue. A.1325.5-1326.

The jury, as the finder of fact, is not properly the arbiter of *legal* issues, particularly not complex issues of federal tax law on which the prosecution's own experts disagree. The probative value of the prosecution's own contradictory expert evidence was low, particularly in a case in which Sanders was not charged with violating federal tax laws. Injecting contradictory testimony from the prosecution's own experts on a legal issue that, based on the facts of this case, was not settled law had a high probability of confusing the jury about its role as arbiter of *facts* and risked causing it to convict Sanders for misconduct of which he was not charged. The trial court rejected a direct curative instruction proposed by Sanders that would have appropriately framed the jury's role and the manner in which it weighed that evidence, constituted an abuse of discretion. Its proposed instruction was inadequate. A.1545. Sanders' conviction must be reversed and vacated.

IX. SANDERS' CONVICTIONS WERE NOT SUPPORTED BY LEGALLY SUFFICIENT COMPETENT EVIDENCE AND THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE COMPETENT EVIDENCE.

The prosecution failed to obtain a single conviction at Trial 1 on any of the 106 counts in the indictment. The Trial 1 jury rejected as not credible the testimony

of the prosecution's "cooperating" witnesses. Sanders' acquittal of 14 FBR counts and the prosecution's dismissal of all remaining FBR counts, is emblematic of the prosecution's inability to marshal sufficient evidence to prove those counts beyond a reasonable doubt. The trial court's further dismissal of all 15 Grand Larceny counts conclusively established the prosecution could not prove Sanders acted with requisite criminal intent.

At Trial 2, although the prosecution's case did not strengthen, Sanders was convicted. The conviction could only have been the result of the pervasive error and misconduct detailed herein. The conviction was not supported by legally sufficient, competent evidence and the jury's verdict was against the weight of the evidence. This Court reviews a challenge to the sufficiency of the evidence *de novo*. *See United States v. Hassan*, 578 F.3d 108, 122 (2d Cir. 21, 2009); *United States v. Rangolan*, 464 F.3d 321, 324 (2d Cir. 2006).

A. Sanders' Conviction On Each Count Was Not Supported By Legally Sufficient Evidence.

Fundamentally, a conviction cannot stand absent legally sufficient evidence. Legally sufficient evidence is "competent evidence which, if accepted as true, would establish every element of an offense charge and the defendant's commission thereof . . . ." C.P.L. § 70.10(1); *see also Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *People v. Contes*, 60 N.Y.2d 620, 621 (1983). The standard for reviewing the adequacy of proof of guilt is "whether, after viewing the evidence in the light most

favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319; *see also* C.P.L. § 70.20. This Court may reverse a conviction if it finds that this stringent standard of proof has not been met. C.P.L. §§ 470.15(3)(a); 470.15(4)(b). It must look to whether there is "any valid line of reasoning . . . which could lead a rational person to the conclusion reached . . . on the basis of the evidence." *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987).

Although the evidence must be viewed in the light most favorable to the prosecution, crediting "every inference that the jury may have drawn" in the prosecution's favor, *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001), the Trial 2 evidence cannot be examined in a vacuum. Nor would it be appropriate to accord the prosecution the benefit and advantages of its own misconduct. Evidence is not "competent" if its admission violates constitutional protections or is so objectively improper that it leaves no doubt as to its inadmissibility. Evidence introduced by the prosecution violated constitutional protections against double jeopardy. Evidence that could not support the crimes charged in Trial 1 *as a matter of law,* A.1043, overlapped with the proof needed to demonstrate elements of crimes remaining at Trial 2 beyond a reasonable doubt, and violated Sanders' double jeopardy protections. This is not "competent" evidence.

Likewise, evidence of uncharged misconduct, the introduction of which violated *Molineux* and served only to inflame the jury and implicate class biases and prejudices, is not "competent" evidence. Argument is not evidence and is not "competent," but may be viewed as such by the jury, particularly where the prosecution seeks to improperly contextualize it, associate it with, and use it to bolster, other evidence. Such a tactic must be rejected. Accordingly, the prosecution's dozens of references to Sanders' invocation of his right to not testify, gratuitous attacks on the defense theory and defense counsel, improper prosecutorial bolstering and witness vouching, and injection of personal belief and sentiment into argument, renders the evidence to which it pertained tainted, incompetent, and entitled to no weight.

Any actual *competent* evidence deliberately and by design constituted unchecked accusations by the prosecution insofar as it pertained to Davis' role. Davis could have provided exculpatory testimony for Sanders and even rebutted on cross-examination (without Sanders having to testify in his own defense) the prosecution's theme at Trial 2 that Davis was the mastermind with whom Sanders schemed and conspired to carry out the charged conduct. In light of the trial court's and prosecution's refusal to compel Davis' return for Trial 2, and the trial court's failure to conduct an appropriate inquiry as to Davis' alleged "unavailability," Sanders was unable to adequately defend against the prosecution's accusations

without, of course, testifying in his own defense at trial. Accordingly, any evidence presented implicating Davis' collaboration and involvement with Sanders in carrying out the charged conduct must be afforded lesser or no weight.

The prosecution failed to comply with its *Rosario*, *Brady,* and *Giglio* obligations thereby precluding Sanders from effectively presenting a defense. Had this evidence been disclosed, Sanders would have been better poised to attack the prosecution's evidence and minimize and mitigate, if not completely neutralize, its sting. The prosecution should not be permitted to benefit from its misconduct and, thus, this Court must minimize the weight afforded to the testimony of the "cooperating" witnesses, to the extent any of those witnesses had any credibility remaining at the close of Trial 2.

Evidence introduced by lay witnesses on an ultimate issue of fact, the introduction of which usurped the jury's fact finding province, was not proper and not "competent" evidence. Also, evidence in a state criminal jury trial, the introduction of which sought to have the jury determine a question of complex and esoteric federal tax questions was not proper and not "competent" evidence.

Absent the balance of incompetent evidence erroneously admitted by the trial court, the prosecution could not have carried its burden. The lack of any evidence establishing Sanders was engaged in, directed others to engage in, or was even aware of the alleged misconduct charged in the Indictment, coupled with the utter lack of

credibility of the prosecution's "cooperating" witnesses, makes clear that Sanders' conviction could *only* have been based on the jury's consideration and weighing of incompetent evidence. For the foregoing reasons, Sanders' conviction is against the weight of the evidence and must be reversed and vacated.

B. Competent, Properly Admissible Evidence, Including the Testimony of the Prosecution's "Cooperating" Witnesses, Was Insufficient to Sustain Sanders' Convictions.

As a matter of law, circumstantial evidence alone is insufficient to sustain a conviction unless it is strong enough to "exclude to a moral certainty all alternative hypothesis of innocence." *Williams*, 35 N.Y.2d at 783. Even if viewed in the light most favorable to the prosecution, the evidence simply cannot meet this standard.

1. Frank Canellas' Testimony Was Not Credible.

The prosecution's case turned principally on the testimony of Canellas, the prosecution's indispensable "cooperating" witness. Canellas was not credible. He was described as someone who lied to banks and auditors, was manipulative, A.1270, 1280.1, was a bully who pushed others around and took advantage of his subordinates, A.1297.1. Canellas, not Sanders, directed others to make fraudulent accounting entries. A.1270.1, 1278.2. Notably, none of the prosecution's witnesses—other than Canellas—testified substantively about Sanders' criminal intent to commit any wrongdoing regarding Dewey's financial statements. On the contrary, the prosecution's own "cooperating" witnesses testified that it was

Canellas, not Sanders, who directed the "false" or "fraudulent" adjustments and other accounting misconduct. *See* A.1232 (Cascino testifying that it was Canellas, not Sanders, who directed her to make incorrect accounting entries "most of the time."); A. 1270.1; *see also* A.1278.2 (Mullikin testifying that Canellas directed him to make "false adjustments"); A.1280.2 (Mullikin testifying he had no personal knowledge as to whether Canellas was getting direction or instructions from anyone else, including Sanders).

Canellas, more than any other witness, had a bias and motive to lie and fabricate testimony to live up to his original, and then renegotiated, plea and cooperation agreement in which the prosecution would recommend a term of imprisonment of one to three years – *half* the term of imprisonment contemplated by the original plea and cooperation agreement, A.252.

2. Cascino's Testimony Was Not Credible and Did Not Reasonably Implicate Sanders In Any Wrongdoing.

Cascino, another "cooperating" witness, admitted to lying, to being "dishonest," "evasive," "saying half-truths" and to saying "I didn't remember things when I did." A.1231. She also admitted to specifically trying to defraud Dewey's auditors without any direction from Sanders, and then lying under oath by not disclosing it when asked at the outset about any other misconduct she may have engaged in. Cascino conceded that she had no idea at the time if her conduct at Dewey was "inappropriate or not." A.1238.

Cascino's testimony did not reasonably implicate Sanders in any misconduct. Rather, when pressed, Cascino readily admitted that she was utterly incapable of offering any specific examples of any discussions she had with Sanders or direction she took from Sanders. A.1232. Indeed, Cascino recalled interacting only with Canellas, not Sanders, on year-end adjustments, A.1242, she reported principally to Canellas, not Sanders, A.1243, and it was Canellas, not Sanders, who instructed Cascino to reverse disbursement write-offs, A.1244-45, conduct forming the basis for one or more FBR counts against Sanders. At bottom, Cascino lied, manipulated the audits and was simply not credible. A.1234-35, 1247-48, 1484-85.

3. Harrington's Testimony Was Not Credible and Did Not Reasonably Implicate Sanders In Any Wrongdoing.

Harrington met with the prosecution on at least five separate occasions. She admitted that, during her first two meetings, Harrington did not have a clear recollection of her work at Dewey, A.1295.3, but did not believe at the time that reversing a disbursement entry, for instance, was wrong, A.1295.4-1295.5. It was not until the prosecution presented her with a cooperation agreement, during her third meeting, that Harrington changed her testimony. Additionally, Harrington is not an accountant. She testified at Trial 2, however, that she entered journal entries into the system that she knew at the time to be incorrect, *see* A.1283, and deliberately lied to auditors by providing them false information, *see* A.1284. She also acknowledged her Trial 1 testimony where she denied knowing about accounting

issues and whether certain expenses are properly amortized. A.1295.1-1295.2. Even then, Harrington expressly testified that she received instruction on accounting matters from Canellas and Mullikin, not Sanders. A.1283. Harrington's testimony, at best, implicated Canellas, not Sanders.

4. Alter's Testimony Did Not Reasonably Implicate Sanders In Any Wrongdoing.

Alter, another "cooperating" witness, testified at Trial 2. He, too, did not believe initially that any actions he took were improper or illegal, but changed his statement after being accused by the lead prosecutor of not being forthcoming and being threatened with an indictment and felony, rather than a misdemeanor charge. A.1297.11-1297.13. Indeed, he initially told prosecutors in February and March, 2013 that he believed leasehold improvements could be amortized as merger related expenses—an understanding he gained at least in part from Canellas, not Sanders. A.1297.14. While Alter had a formal reporting relationship to Sanders, he testified he interacted predominantly with Canellas and Mullikin. A.1297.17. He further testified that any improper adjustments were done by Cascino acting alone, not at the direction of anyone else. A.1297.15-1297.16.

5. The Prosecution's "Expert" Testimony On Proper Accounting and Tax Treatment Was Inconsistent, Contradictory, and Confused the Jury On a Complex Legal Issue.

The prosecution's own purported expert tax and accounting witnesses provided contradictory testimony on a complex legal issue relating to the appropriate

treatment under federal tax law for amortizing merger-related expenses such as lease termination fees. *Compare* A.1319.1-1320 (Bailey), *with* A.1160.1-1160.12 (Weichholz). The accounting questions at issue were significant to the prosecution's theory of the Scheme to Defraud and Conspiracy counts, yet the prosecution's own expert witnesses could not agree on the appropriate treatment under federal tax law. Coupled with the prosecution's "cooperating" witness' testimony that failed to implicate Sanders and was biased or false, there was not sufficient evidence to convict Sanders, even viewing the evidence in the light most favorable to the prosecution.

C. The Jury Verdict Convicting Sanders On Each Count Was Against the Weight of the Competent, Admissible Evidence.

1. Legal Standard.

Even if the evidence is legally sufficient to sustain a conviction, this Court may still reverse the conviction where it is shown to have been against the weight of the evidence. *See People v. Freeman*, 98 A.D.3d 682 (2d Dep't 2012); *People v. Campbell*, 79 A.D.3d 624 (1st Dep't 2010); *People v. Seymour*, 77 A.D.3d 976, 979-80 (2d Dep't 2010); *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987). Sanders is entitled to one appellate review of the facts. *See* C.P.L. §§ 470.15(5); 470.20(5).

Weight of the evidence review recognizes that "[e]ven if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further." *People v. Cahill*, 2 N.Y.3d 14 (2003) (citing *Bleakley*, 69

N.Y.2d 490). Where a different verdict would not have been unreasonable given the evidence presented, this Court has statutory authority to weigh the evidence just as a jury does at trial to determine whether the jury was justified in finding the defendant guilty. C.P.L. § 470.15; *People v. Danielson*, 9 N.Y. 3d 342, 348-50 (2007). In conducting this factual review, the Court first must determine "whether, based on all credible evidence, a different finding would not have been unreasonable." *People v. Romero*, 7 N.Y.3d 633, 643 (2006) (internal quotations omitted); *see also Cahill*, 2 N.Y.3d at 58. If so, then this Court "*like the trier of fact below*, [shall] 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.'" *Romero*, 7 N.Y.3d at 643 (emphasis added).

2. The Jury Verdict Was Against The Weight Of The Evidence.

The jury was required to acquit Sanders if it could draw even a single reasonable inference consistent with innocence from the proven facts. Although some deference may be given to the jury's opportunity to observe witnesses, this Court reviews the facts as a "thirteenth juror" and must itself "weigh the evidence and form a conclusion as to the facts." *Cahill*, 2 N.Y.3d at 58. That review involves "an independent assessment of the evidence to determine whether the jury's verdict was factually correct." *Romero*, 7 N.Y.3d at 643. Convictions based on circumstantial evidence are subjected "to strict judicial scrutiny"—*i.e.* the "close

judicial supervision . . . necessary to ensure that the jury [did] not make inferences which are based not on the evidence presented but rather on unsupported assertions drawn from evidence equivocal at best." *People v. Kennedy*, 47 N.Y.2d 196, 201-02 (1979). At bottom, a verdict is not supported by the weight of the evidence unless, based upon all credible, competent evidence, the finding is not unreasonable. *Bleakley*, 69 N.Y.2d at 495.

As discussed immediately above, the prosecution's case was circumstantial, based largely on constitutionally infirm, incompetent and overly inflammatory evidence, much of which was recycled from Trial 1 where the jury did not return a guilty verdict on any of the 106 counts in the Indictment. What evidence may have been competent and admissible at Trial 2 did not, on balance, establish that Sanders had a meaningful, if any, role in any charged conduct. This is particularly true given the non-credible testimony of the "cooperating" witnesses, the motives among those witnesses to shade the truth and direct blame onto Sanders, and the contradictory lay and expert testimony.

This is further apparent from Sanders' anomalous conviction for involvement in a criminal conspiracy in which no other named co-conspirator was convicted. As discussed above under Issues I and II, a conspiracy "consists of an agreement to commit an underlying substantive crime . . . coupled with an overt act committed by one of the conspirators in furtherance of the conspiracy." *Caban*, 5 N.Y.3d at 149.

The "meeting of the minds" and "agreement" between co-conspirators is the *quintessential* fact of a conspiracy charge. The essence of conspiracy is an agreement to commit the criminal "object" of the conspiracy as defined in the charging instrument. *See United States v. Jimenez Recio*, 537 U.S. 270, 274 (2003); *see also Iannelli v. United States*, 420 U.S. 770, 777 (1975). "Unlawful agreement" is "[t]he fundamental element of a conspiracy." *United States v. Rubin*, 844 F.2d 979, 983 (2d Cir. 1988). To meet the "unlawful agreement" element, "the evidence must show that 'two or more persons agreed to participate in a joint venture intended to commit an unlawful act.'" *United States v. Banki*, 685 F.3d 99, 117 (2d Cir. 2011) (quoting *United States v. Parker*, 554 F.3d 230, 234 (2d Cir. 2009)); *see also United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990); *see, e.g.*, *People v. Washington*, 8 N.Y.3d 565, 572 (2007).

To meet its burden, "the government must establish a unity of purpose, an intent to achieve a common goal, and an agreement to work together" to achieve that common goal. *United States v. Hitt*, 107 F. Supp. 2d 29, 33 (D.D.C. 2000), *aff'd*, 249 F.3d 1010, 1023 (D.C. Cir. 2001) (quoting *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir. 1994)). It makes no difference if two people may operate toward the same purpose unless they have *agreed* to act toward that purpose together. *See United States v. Geibel*, 369 F.3d 682, 690 (2d Cir. 2004) ("[C]onspiracy is not defined by its purpose but rather by the agreement of its members to that purpose.")

(quoting *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (internal quotation marks omitted)).

In order to prove an agreement to break the law, the prosecution may not rely upon evidence of "a vague agreement to do something wrong.'" *United States v. Salameh*, 152 F.3d 88, 151 (2d Cir. 1998) (quoting *United States v. Provenzano*, 615 F.2d 37, 44 (2d Cir. 1980)); *see also United States v. Al Kassar*, 660 F.3d 108, 126 (2d Cir. 2011); *United States v. Morgan*, 385 F.3d 196, 206 (2d Cir. 2004) (quoting *United States v. Friedman*, 300 F.3d 111, 124 (2d Cir. 2002)). The law, instead, requires not just "a general agreement to engage in unspecified criminal conduct," but an agreement "as to the '*object'* of the conspiracy." *United States v. Rosenblatt*, 554 F.2d 36, 39 (2d Cir. 1977) (emphasis added).

Here, DiCarmine, an alleged co-conspirator, was acquitted of all charges at Trial 2, including the Conspiracy. Davis, the other alleged co-conspirator, was given a DPA by the prosecution (as discussed above in Issue VI), which then impeded Sanders' ability to call Davis to testify at Trial 2 at which Davis likely would have denied the existence of any criminal conspiracy with Sanders. The result is a Conspiracy conviction that goes against the weight of the evidence and should be reversed and vacated. And, excising the unconstitutional, highly inflammatory and incompetent evidence from the equation leaves very little on which to convict and makes clear that Sanders could and should have received a verdict that co-defendant

DiCarmine received: not guilty on all charges. For these reasons, this Court should reverse and vacate *all* convictions.

X. THE TRIAL COURT DEPRIVED SANDERS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL AND TO A FAIR AND IMPARTIAL JURY WHEN IT REFUSED TO EXCUSE A BIASED JUROR, DECLARE A MISTRIAL, AND WHEN IT CONDUCTED AN INEFFECTIVE *BUFORD* INQUIRY.

Shortly into jury deliberations, a juror contacted another New York criminal court judge to discuss the case in violation of the trial court's explicit instructions. The trial judge refused to discharge the juror, refused to declare a mistrial, and conducted an utterly ineffectual *Buford* inquiry, depriving Sanders his right to a fair trial and to a fair and impartial jury.

A. Legal Standard.

Sanders has a constitutional right to trial by an impartial jury. *See* N.Y. CONST., art. I, §§ 2, 6; U.S. CONST. amend. VI, amend. VIX; *People v. Kuzdzal*, 31 N.Y.3d 478, 483 (2018); *People v. Arnold*, 96 N.Y.2d 358, 360 (2001); *People v. Thomas*, 196 A.D.2d 462, 465 (1993). Indeed, "[t]he presumption of innocence, the prosecutor's heavy burden of proving guilt beyond a reasonable doubt, and the other protections afforded the accused at trial, are of little value unless those who are called to decide the defendant's guilt or innocence are free of bias." *Thomas*, 196 A.D.2d at 465 (quoting *People v. Branch*, 46 N.Y.2d 645, 652 (1979)).

New York criminal procedure law is clear: if "a juror is grossly unqualified to serve in the case or has engaged in misconduct of a substantial nature. . .*the court must discharge such juror*. . . . If no alternate juror is available, *the court must declare a mistrial*. . . ." C.P.L. § 270.35(1). A juror must be deemed "grossly unqualified" "when it becomes obvious that a particular juror possesses a state of mind which would prevent the rendering of an impartial verdict," *People v. Holder*, 150 A.D.3d 886, 886 (2d Dep't 2017) (citing *People v. Buford*, 69 N.Y.2d 290, 298 (1987)) (internal citation omitted), including exhibiting an inability or unwillingness to follow a trial court's clear and unequivocal instructions, *see People v. Fox*, 172 A.D.2d 218, 219-20 (1st Dep't 1991) (juror was properly discharged because he engaged in misconduct of a substantial nature by ignoring the court's express instructions to not discuss the case).

Moreover, a juror's disregard and violation of a trial court's instruction to not speak with others about the case amounts to "substantial misconduct," compelling discharge from the jury. *See Fox*, 172 A.D. 2d at 219-20; *see also People v. Neulander*, 162 A.D.3d 1763, 1767 (4th Dep't 2018); *see also People v. Pineda*, 269 A.D.2d 610, 611 (2d Dep't 2000); *People v. Johnson*, 217 A.D.2d 667, 668 (2d Dep't 1995). To determine whether a juror is grossly unqualified or has engaged in substantial misconduct, the trial court must typically conduct a "probing and tactful inquiry" as required by *Buford*, 69 N.Y.2d 290 (1987) ("*Buford* inquiry") into the

unique facts of the case, which includes a careful consideration of the juror's "answers and demeanor." *People v. Sanchez*, 123 A.D.3d 624 (1st Dep't 2014). A *Buford* inquiry should be conducted in order to confirm whether a juror has engaged in conduct that amounts to "substantial misconduct" or conduct that might suggest the juror is "grossly unqualified." If the facts support either conclusion, the offending juror *must* be discharged.

If, however, the facts clearly establish that a juror has engaged in substantial misconduct, or is grossly unqualified, no *Buford* inquiry is necessary. The trial court *has no discretion – it must discharge the juror.* Upon dismissal of a juror under Section 270.35(1), a mistrial must be declared if an alternate juror is not available, such as during jury deliberations where alternates have been dismissed. C.P.L. § 270.35(1); *see also* C.P.L. § 280.10(3); *People v. Rodriguez*, 71 N.Y.2d 214, 219 (1988). A trial court's denial of a mistrial motion where there is evidence that the jury was grossly unqualified or engaged in substantial misconduct is an abuse of discretion. *Sanchez*, 123 A.D.3d at 624.

B. Juror Lori Phillips Violated the Trial Court's Instruction by Communicating with Judge Konviser.

In the afternoon of May 1, 2017, the jury began deliberations ("Day 1"). When it adjourned for the evening, the trial court instructed the jury, as it had countless times before throughout Trial 2. At this point, the trial court admonished

the jury of the even greater importance of following these rules now that the case was in deliberations. *See* A.1389-91.

On May 2, 2017 ("Day 2"), the jury deliberated throughout the day until the trial court adjourned and instructed the jury, once again, of the critical stage of deliberations, the absolute prohibition on discussing the case with anyone outside of the jury deliberations room, and the heightened importance to heed the trial court's instructions. A.1392-94.

On May 3, 2017 ("Day 3"), at 7:08 am, Juror Lori Phillips sent an email (the "Juror Phillips email") to her friend, New York County Supreme Court Justice Jill Konviser ("Judge Konviser"). The Juror Phillips email posed the following question[26]: "***I understand if you cannot answer, if a case is so easy to prove, why would a defendant/attorney agree to go to trial?***" A.1400 (emphasis added). Justice Konviser immediately responded at 7:09 am: "***We will talk after the verdict, okay?***" A.1400 (emphasis added).

Juror Phillips then deliberated throughout Day 3. At the close of Day 3, the trial court reaffirmed its instructions from the prior two days of deliberations, noting that "[t]hese are critical rules, they are essential to the integrity to the process which

[26] Because the trial court sealed the Juror Phillips email, a copy was not included in the record provided to appellate counsel. Accordingly, included herein is the relevant quoted passage from the in-chambers hearing transcript held the morning of May 4, 2017.

we have all committed ourselves." A.1395-97. Despite having sent her email earlier that same day, Juror Phillips failed to notify the trial court of her highly improper communication. The improper communication was not disclosed—either by forwarding the email or raising it orally—to the trial court until approximately 5:00 pm on May 3, 2017 when Judge Konviser raised it personally with the trial judge. Because of the delay in notifying the trial judge of the email, Juror Phillips had the opportunity to return to the jury room and participate in a full day of deliberations..

On the morning of May 4, 2017 ("Day 4"), the trial court advised the parties about the Juror Phillips email. The trial court noted that, based on a discussion with Judge Konviser, Juror Phillips' friendship with Judge Konviser predated the jury being empaneled; Juror Phillips had failed to disclose her close personal relationship with Judge Konviser during jury selection despite express questions seeking such information, A.1398-99, which deprived Sanders an opportunity to challenge or request a more searching *voir dire*.

Counsel for Sanders and DiCarmine both demanded that Juror Phillips be excused and a mistrial declared, even without a *Buford* inquiry given Juror Phillips misconduct, her blatant disregard of the trial court's instructions and her demonstrated hostility to the notion of Sanders' "presumption of innocence." She had also improperly previewed not just her own views but potentially the sense of the jury at that early point in deliberations. A.1400.1-1403.2. The prosecution

conceded Juror Phillips engaged in misconduct, as did the trial judge. *See* A.1403.2. All parties recognized the risk that conducting any "probing" inquiry might pose to preserving the integrity and confidentiality of jury deliberations, a point Sanders' counsel underscored as necessitating dismissal *without* an inquiry. *See* A.1405.

The trial court denied Sanders' mistrial motion but with leave to renew after speaking with Juror Phillips. A.1406.1. Sanders' counsel contended that, short of a mistrial, the only way to ensure fairness in jury deliberations and not render this process merely an exercise in rehabilitating Juror Phillips was to ask probing questions and any appropriate follow up. A.1408.2-1408.3. The trial court denied the defense application in favor of an inquiry only of Juror Phillips as proposed by the prosecution. A.1408.1-1408.4. The trial court then previewed that, during its so-called *Buford* inquiry, it would admonish Juror Phillips not to discuss what she or any other juror may be thinking about the case, or what is going on in the deliberations room, and then present the email to her to explain why she sent it. A.1408.4-1408.5.

Juror Phillips confirmed sending the email after being confronted in chambers. A.1410. The *only* question posed by the trial judge was: "*did you pose this question or a similar question or any questions for that matter to anybody else*?" A.1410. Juror Phillips denied she had done so. After conferring with counsel outside the presence of Juror Phillips, she was called back in, asked whether she

could "continue to be fair and impartial" and follow all instructions. A.1414. Sanders renewed his mistrial motion, which the trial court denied. A.1415.

C. Juror Phillips' Email Communication About the Case Amounted to Substantial Misconduct and Grounds For Discharge Without The Need For A *Buford* Inquiry.

As an initial matter, the trial court erred when it denied the defense mistrial motion and opted to conduct a limited and ineffectual inquiry. No such inquiry was necessary nor was it appropriate. Juror Phillips' email communication with Judge Konviser to her personal email address (*i.e.*, outside the court's official email server) during deliberations in an effort to discuss the case and elicit advice in disregard of and indifference to the trial court's countless instructions amounted to clear "substantial misconduct." *See Neulander*, 162 A.D.3d at 1767; *Pineda*, 269 A.D.2d at 611; *Johnson*, 217 A.D.2d at 668; *Fox*, 172 A.D.2d at 219-20.

Unlike other cases where a *Buford* inquiry may be necessary to explore the factual bases for the alleged misconduct or to confirm or corroborate whether the allegation of misconduct has merit, here, Juror Phillips' misconduct was undisputed, intentional, and egregious. Accordingly, the trial court was statutorily required to discharge Juror Phillips and declare a mistrial. *See* C.P.L. § 270.35(1). Section 270.35(1) recognizes the virtual impossibility of dissecting the potential harm to the integrity of the jury deliberations process, a point repeatedly made by Sanders' counsel as the reason for foregoing any *Buford* inquiry and simply discharging Juror

Phillips as the statute requires. Thus, having established that Juror Phillips sent the email to Judge Konviser, and a fair reading of it suggests hostility to Sanders' presumption of innocence, any further inquiry which would necessarily be constrained, was contrived for the purpose of rehabilitating the juror in order to continue deliberations. Section 270.35(1) requires more.

"[A] credible allegation that a juror is grossly unqualified to serve or engaged in substantial misconduct within the meaning of C.P.L. § 270.35 cannot be ignored by the trial court, and failure to appropriately remedy the matter is reversible error." *Kuzdal*, 31 N.Y.3d at 487. On appeal, Sanders is not required to show Juror Phillips' misconduct during the trial influenced the verdict; demonstrating that it was *likely* to influence the verdict is sufficient to warrant granting a mistrial motion. *See People v. Pauley*, 281 A.D. 223, 226 (4th Dep't 1953).

First, the trial court did not have the discretion to ignore the clear statutory mandate of Section 270.35(1) and simply "rehabilitate" Juror Phillips in the face of her demonstrative misconduct. That the trial court believed rehabilitating Juror Phillips "is sort of the whole point of talking to her in the first place" misreads Section 270.35(1) and constituted an abuse of discretion. Further, Juror Phillips' misconduct was not limited to her email to Judge Konviser; she concealed from the trial court and counsel her close relationship with Judge Konviser during jury selection. And, it is clear from the familiar tone and tenor of the email

communication, and the fact that Juror Phillips even had Judge Konviser's personal email address and received a response from her instantaneously, that the relationship was not only quite close, but had included prior communications about Juror Phillips' service on this jury. Yet the trial court failed entirely to inquire of these issues. The email further underscored this amounted to substantial misconduct because Juror Phillips, whether intentionally or unwittingly, revealed at least her own views and perceptions of deliberations, if not those of the remaining jurors, only two days into deliberations. Finally, Juror Phillips' misconduct, and the delay in reporting and addressing it, allowed her to adulterate one or more remaining jurors and infiltrated the deliberations themselves, none of which was sufficiently probed by the trial court. For all of these reasons, Juror Phillips' substantial misconduct compelled the trial court to discharge her from the jury and declare a mistrial.

D. Juror Phillips Lacked the Mindset to Fairly and Impartially Weigh the Evidence and Was Grossly Unqualified to Continue Serving on the Jury.

"Trial courts, when presented with some credible information indicating that a sworn juror may be grossly unqualified, must conduct a probing and tactful inquiry of the juror." *Kuzdzal*, 31 N.Y.3d at 486 (citing *People v. Buford*, 69 N.Y.2d 290, 299 (1987)). A fair reading of the Juror Phillips email, to the exclusion of the untenable reading by the prosecution or the trial court, *see* A.1403.3, 1408-1408.5, is that Juror Phillips sought to discuss the case with her friend Judge Konviser and

seek her advice on a central issue for the jury (and the jury alone) to determine in its deliberations.

Although brief, the email to Justice Konviser suggested a mindset hostile, or at least incredulous, to the notion that Sanders would choose to proceed to trial when the prosecution's case was "so easy to prove." A.1400. Moreover, Juror Phillips was permitted to spend an entire day deliberating with the remaining jurors after having violated the trial court's instructions and maintaining a mindset antagonistic to reaching an impartial verdict, thereby depriving Sanders a fair jury trial. The email further establishes that, despite the trial court's instructions, Juror Phillips held a misguided view of Sanders' presumption of innocence and right to a jury trial. This alone should have ended the trial court's analysis, particularly when further inquiry would necessarily be constrained and contrived for the purpose of rehabilitating the juror in order to continue deliberations. For the foregoing reasons, the trial court abused its discretion in not discharging Juror Phillips as grossly unqualified and in denying Sanders' the mistrial motions.

E. Alternatively, the Trial Court Failed to Conduct An Appropriately Probing and Effective Inquiry and Erred When It Denied Sanders' Mistrial Motion.

Even before conducting its *Buford* inquiry, and without the benefit of Juror Phillips' responses, the trial court was predisposed to find no wrongdoing worthy of dismissal, A.1400, thereby explaining its disregard for C.P.L. § 270.35(1).

Even if the trial court had discretion under the circumstances in this case to conduct a *Buford* inquiry despite clear evidence militating in favor of immediate discharge, the trial court's inquiry was ineffective, overly constricted, did not probe the issues raised by Sanders, and was designed to ultimately retain and rehabilitate Juror Phillips. In conducting its inquiry of Juror Phillips, the trial court asked a single question related to the content of her email: "*did you pose this question or a similar question or any questions for that matter to anybody else*?" A.1410.

Additionally, the trial court's decision to pose a single question and afford deference to the response of a juror who had already exhibited a dishonesty and disregard for the trial court's countless instructions was an abuse of discretion. It also left unanswered questions that would otherwise constitute an appropriately probing inquiry, including but not limited to: (1) why the trial court's countless instructions were ignored; (2) the scope and nature of the relationship and failure to disclose it during jury selection; (3) the rationale for sending the email and its timing during deliberations; (4) the scope and content of communications; and (5) discussions with other jurors regarding those communications.

As to the whether she may have discussed her email with any other juror, Juror Phillips may likely have been chilled in her response given the trial court's admonition only moments before that she should not reveal any views about the case she or any other juror may have, or to "tell us anything that has been going on in the

jury room." A.1409-10. It is entirely likely that, when answering "no" to the trial court's question, Juror Phillips was abiding by the trial court's immediately preceding instruction to not disclose whether she discussed it with anyone *in the jury room.* The difficulty of reconciling the competing interests of Sanders' right to a fair trial, on the one hand, and protecting the integrity of jury deliberations, on the other, should have compelled the trial court to err on the side of protecting Sanders' constitutional rights by discharging Juror Phillips and declaring a mistrial, rather than protecting Juror Phillips sensitivities and the integrity of a jury deliberations process that had been quite reasonably called into question.

The trial court erred in denying Sanders' original Motion for Mistrial in reliance on *People v. Clark*, 81 N.Y. 2d 913 (1993), *People v. Simon*, 224 A.D.2d 458 (2d Dep't 1996), and *People v. Reader*, 142 A.D.3d 1109 (2d Dep't 2016). Neither *Clark*, *Simon*, nor *Reader* involve jury misconduct during deliberations when the process of conducting an sufficiently probative *Buford* inquiry is necessarily limited by the trial court's concern over invading the sanctity of jury deliberations. Nor did the conduct in those cases involve a juror who exhibited such patent hostility to Sanders' constitutional right to presumption of innocence and right to demand a jury trial regardless of the perceived strength of the prosecution's evidence. Such competing concerns between preserving Sanders' right to a fair and impartial jury trial, and preserving the sanctity of jury deliberations, are hardly

reconcilable under the circumstances in this case—precisely the issue raised by Sanders prior to the trial court questioning Juror Phillips. *See* A.1408.2-1408.3.

The trial court further erred when it denied Sanders' renewed motion for mistrial. A.1415. The trial court's inquiry neither addressed nor remedied the concerns raised by Juror Phillips' misconduct. It fell short of that "probing" inquiry required by *Buford*. *See People v. Thomas*, 196 A.D.2d 462, 464 (1st Dep't. 1993); *People v. Anderson*, 123 A.D.2d 770, 771-72 (2d Dep't. 1986).

Finally, the severity and egregiousness of Juror Phillips' conduct far exceeded any perceived misconduct or lack of qualifications of other jurors already dismissed by the trial court. Indeed, the trial judge had already dismissed one juror due to her failure to follow the trial court's express instructions after she unintentionally spoke with Defendant DiCarmine. *See* A.1265-66. The trial court also dismissed other qualified jurors who had engaged in far less egregious conduct than Juror Phillips, A.1132-33 (juror dismissed as "grossly unqualified" for being tardy twice); *see also* A.1118-19 (juror dismissed as unavailable after she relocated with her 4-month old baby to Yonkers).

Accordingly, the trial judge abused its discretion when it denied Sanders' motion and renewed motion for mistrial, declined to discharge Juror Phillips, and failed to conduct even a minimally probing and effective inquiry.

XI. THE TRIAL COURT'S ERRORS CUMULATIVELY DEPRIVED SANDERS HIS RIGHT TO A FAIR TRIAL.

The magnitude and cumulative effect of the trial court's numerous errors throughout Trial 2 deprived Sanders of his constitutional right to a fair trial. *People v. Johnson*, 114 A.D.2d 210, 214 (1st Dep't 1986). Although certain trial errors, when viewed in isolation, may be subject to a harmless error analysis, the courts maintain an "overriding responsibility" to ensure that the defendant's cardinal right to a fair trial is respected. *People v. Wlasiuk*, 32 A.D.3d 674, 675 (3d Dep't 2006). Thus, reversal of a defendant's conviction is appropriate where the cumulative errors denied the defendant a fair trial and did not constitute harmless error. *See People v. Nicholas*, 130 A.D.3d 1314, 1318-19 (3d Dep't 2015). The trial errors discussed above all, cumulatively, denied Sanders a fair trial and guaranteed his conviction. *See Johnson*, 114 A.D.2d at 215 (admission of improper *Molineux* evidence, the prosecution's improper arguments during summation, and the trial court's omission in providing proper limiting instructions to the jury resulted in cumulative errors that mandated reversal of the defendant's conviction); *see also Nicholas*, 130 A.D.3d at 1319 (defendant was deprived of a fair trial due to the cumulative effect of admitting inadmissible *Molineux* evidence in addition to the improper vouching by a prosecution witness).

In the absence of these cumulative errors, which permeated and infected Trial 2, Sanders would not have been convicted. *People v. Pryor*, 70 A.D.2d 805, 806

(1st Dep't 1979) (cumulative errors created the significant probability that had the errors not occurred, defendant may have been acquitted). Accordingly, Sanders' convictions must be reversed and vacated as the cumulative effect of the multiple trial errors did not constitute harmless error.

XII. SANDERS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS A RESULT OF HIS DEFENSE COUNSEL'S FAILURE TO SEEK, AND THE TRIAL COURT'S FAILURE TO GRANT, A SEVERANCE OF TRIAL 2 FROM CO-DEFENDANT STEPHEN DICARMINE.

Sanders' counsel should have sought severance from co-defendant Steve DiCarmine at Trial 2 in light of DiCarmine's Trial 1 strategy to deflect blame onto Sanders and away from himself. It could logically be anticipated that DiCarmine's Trial 2 strategy would largely, if not completely, mirror his Trial 1 strategy, at least in terms of relative assignment of blame. With this knowledge, there was no way for counsel to objectively conclude that a joint trial would inure to Sanders' benefit or for him to ignore the obvious reality that a joint Trial 2 would be highly prejudicial to Sanders.

A. Legal Standard.

Both the Federal and New York State Constitutions guarantee the right that the defendant will receive effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (Sixth Amendment right to effective assistance of counsel), *reh'g denied*, 467 U.S. 1267 (1984); *People v. Baldi*, 54 N.Y.2d 137, 146 (1981). To determine ineffective assistance of counsel, a defendant

must show: (1) that his counsel's performance was deficient, and (2) that the deficiency caused defendant prejudice. *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984). To establish prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

New York courts have adopted a standard that is "broader than its federal counterpart." *People v. Claudio*, 83 N.Y.2d 76, 84 (1993) (Titone, J., concurring); *see People v. Garcia*, 75 N.Y.2d 973, 974 (1990). To show that the defendant did not receive meaningful representation, the defendant must demonstrate an absence of strategic or some other legitimate explanation for counsel's alleged shortcomings. *People v. Benevento*, 91 N.Y.2d 708, 712 (1998) (to succeed on a claim of ineffective assistance of counsel under the New York Constitution, the defendant must "demonstrate the absence of strategic or other legitimate explanations for counsel's failure to pursue 'colorable' claims."). In reviewing whether Sanders received ineffective assistance of counsel, this Court must determine whether trial counsel was reasonably competent, and but for counsel's error, there exists a reasonable probability that the result of the defendant's proceeding would have been different. *See Baldi*, 54 N.Y.2d at 146.

B. Sanders' Counsel's Performance Was Deficient.

First, Sanders can demonstrate that his counsel's representation on the issue of trial severance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Acts or omissions "outside the wide range of professionally competent assistance" constitute deficient performance. *Id.* at 690. A single error in judgment may so infect the fairness and outcome of a trial that it alone can constitute deficient performance for purposes of establishing ineffective assistance of counsel. The failure to seek severance of trial from DiCarmine in Trial 2, particularly after having witnessed the strategic maneuvers by DiCarmine at Trial 1, constitutes deficient performance.

1. Severance was Warranted Under the Circumstances.

As an initial matter, the decision to grant or deny a separate trial is within the discretion of the trial judge. *People v. Mahboubian*, 74 N.Y.2d 174, 183 (1989). A trial court should sever defendants indicted together "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Even where the issue is not adequately preserved for appeal, the appellate courts may still reverse a conviction as a matter of discretion in the interests of justice. *People v. Figueroa*, 193 A.D.2d 452, 456 (1st Dep't 1993).

Although public policy may typically favor joinder because it expedites the judicial process, where it appears that "a joint trial necessarily will, or did, result in unfair prejudice to the moving party and substantially impair[ed] his defense" a severance must be granted. *Mahboubian*, 74 N.Y.2d at 184. "Severance is compelled where the core of each defense is in irreconcilable conflict with the other and where there is a significant danger, as both defenses are portrayed to the trial court, that the conflict alone would lead the jury to infer defendant's guilt." *Id.* If co-defendant defenses are antagonistic and mutually exclusive, severance is warranted. The jury cannot credit both defenses at a single trial and, in turn, may "unjustifiably conclude[] by virtue of the conflict itself that both defenses were incredible and gave undue weight to the government's evidence." *Id.*, at 185 (trial court's denial of co-defendants' requests for severance deprived them of a fair trial and a full opportunity to present their defenses warranting reversal of the conviction and new trial).

Severance is particularly appropriate and should be requested where one co-defendant takes an aggressive, adversarial stance against one or more other co-defendants. *See People v. Cardwell*, 78 N.Y.2d 996, 997 (1991); *see also Davydov*, 144 A.D.3d at 1171-72 (because defenses were irreconcilably in conflict, and that conflict alone could have led the jury to infer the defendant's guilt, there was no legitimate strategic reason for counsel's failure to request a severance of the trial).

Any inquiry into the prejudicial effect after the refusal to sever a trial is fact-specific and the appellate courts have the benefit of a "full trial record by which they may, within the ambit of their respective review powers, determine the existence of irreconcilable conflict and its possible effect on the verdict." *Mahboubian*, 74 N.Y.2d at 184-85).

2. DiCarmine Had a Demonstrated Antagonistic Defense To Sanders During Trial 1 and Counsel Should Have Anticipated DiCarmine to Pursue the Same Strategy at Trial 2.

Sanders' counsel provided ineffective assistance of counsel by failing to request that Sanders' Trial 2 be severed from DiCarmine's Trial 2 in order to ensure Sanders' could receive a fair trial. This is true even if counsel believed the trial court would ultimately deny the request. A review of the trial record supports that DiCarmine had an antagonistic defense to Sanders throughout both Trial 1 and Trial 2. *See, e.g.*, A.761 (shifting blame to Davis' subordinates, including Sanders, for accounting issues); A.762 (same); A.1124 (Sanders was CFO and did not report to DiCarmine); A.1125 (Sanders oversaw financial reporting and directly reported to Davis not DiCarmine); A.1126 (DiCarmine had no accounting expertise and deferred to Sanders).

At Trial 2, like Trial 1, DiCarmine repeatedly highlighted that Sanders appeared in a majority of the prosecution's emails regarding Dewey's finances and accounting, while DiCarmine did not. DiCarmine also isolated his own involvement

in the alleged Scheme to Defraud by arguing, again, that he was not included in the majority of the emails and was not involved in the private placement or accounting process. DiCarmine's strategy of foisting blame on Sanders as done in Trial 1 was equally evident in Trial 2. *Compare* Trial 1 argument A.943-44 (arguing Sanders was concealing improper from DiCarmine) *with* Trial 2 argument A.1327-30 (arguing all the evidence points to Sanders' and *not* DiCarmine's involvement in the alleged scheme to defraud).

As in *Davydov* and *Cardwell*, there was no legitimate, strategic reason for Sanders' counsel not to at least request a severance of the Trial 2. The defendants here had antagonistic defenses, which created an irreconcilable conflict. *See Cardwell*, 78 N.Y.2d at 997; *see Davydov*, 144 A.D.3d at 1171 (finding no legitimate strategic reason for defense counsel's failure to request severance after it was clear that co-defendant's defense would be antagonistic to defendant's defense). Indeed, DiCarmine's counsel deliberately took an adversarial stance by isolating DiCarmine from the alleged scheme and conspiracy, and highlighting all of the email exchanges and meetings that Sanders participated in with other cooperating witnesses, banks, or investors. It was clear from opening statements that DiCarmine intended to pursue a defense that was irreconcilably in conflict with Sanders' defense, just as it did at Trial 1.

C. Sanders Was Prejudiced By His Counsel's Failure to Seek Severance Which Constituted Ineffective Assistance of Counsel.

The second prong of the *Strickland* test requires a defendant to demonstrate prejudice, which is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. In other words, did "counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).

This case is far different from a garden variety case in which a severance has not been requested, but in retrospect, should have been requested. Here, Sanders had the opportunity at Trial 1 to preview and anticipate what to expect at Trial 2. The symmetry between Trial 1 and Trial 2 strategy was entirely predictable—DiCarmine was targeting Sanders to protect himself. Finally, Sanders' prejudice by counsel's failure to request severance is evident in his conviction on all three counts, while DiCarmine was acquitted. Sanders had to pay a $1 million fine and spend time (albeit abbreviated) in prison, while DiCarmine did not. Sanders additionally had his bar license revoked, depleted his and his wife's savings and retirement account, while DiCarmine did not.

D. The Ineffective Assistance of Sanders' Counsel Satisfies the Lesser New York State Constitutional Standard of Ineffective Assistance.

Under Article 1, Section 6 of the New York State Constitution, Sanders' right to competent counsel was violated. Because Sanders has satisfied the more stringent federal test for ineffective assistance of counsel, he satisfies the more lenient New York Constitutional threshold and is entitled to relief. *See Baldi,* 54 N.Y.2d at 146-47. Sanders was deprived a fair trial and of meaningful representation. There is no legitimate explanation or strategic reason for Sanders' counsel to fail to seek severance of the trials. Accordingly, Sanders' conviction must be reversed and vacated.

XIII. THE TRIAL COURT ERRED IN DENYING SANDERS' MOTION TO VACATE BASED ON CANELLAS' RECANTATION, WHICH SUPPORTED SANDERS' CLAIM OF ACTUAL INNOCENCE.

Canellas recanted his testimony following Sanders' convictions at Trial 2 and on the eve of Sanders' sentencing. The recantation directly contradicts Canellas' testimony at Trial 2 and leaves no doubt that he *never* believed either he or Sanders committed any crimes. Canellas' testimony inculpating Sanders at Trial 2 and explaining away his own prior denials, was coerced, forced and perjured. This recantation, if uttered before Sanders' conviction, would have done more than simply impeach Canellas; it would have fundamentally altered the outcome of Trial 2. The trial court's ruling denying Sanders' motion to vacate his conviction based on the Canellas recantation, was not harmless error. Sanders' new evidence proves

two distinct claims: (i) a claim that the newly discovered evidence warranted a new trial pursuant to C.P.L. § 440.10(1)(g); and (ii) a claim of actual innocence brought under the federal and state constitutions.

A. <u>Legal Standard</u>.

To establish a claim that newly discovered evidence warranted a new trial, a defendant must show "by a preponderance of the evidence that, had this newly discovered evidence been received at trial, a probability exists that the verdict would have been more favorable to him." *People v. Wong*, 11 A.D.3d 724, 726-727 (3d Dep't 2004). As to the claim of actual innocence, a defendant must establish "by clear and convincing evidence (considering the trial and hearing evidence) that no reasonable juror could convict the defendant of the crimes for which the [defendant] was found guilty." *People v. Cole*, 1 Misc. 3d 531, 543, 2003 N.Y. Slip Op. 23760 (Sup. Ct. Kings Cty. 2003). In making its determination, a trial court must consider all reliable evidence, "whether in admissible form or not." *Id.*

The trial court's summary denial of Sanders' motions to vacate must be reversed because the trial court failed to meaningfully assess the Canellas recantation in light of the evidence presented at trial and its factual conclusions are contradicted by the record evidence. Further, the trial court's evaluation of the new evidence was legally flawed because it did not consider that evidence in its totality or from the perspective of a reasonable, properly instructed juror. *See Schlup v.*

Delano, 513 U.S. 298, 329 (1995). This Court is not bound by the trial court's factual conclusions; rather, it may reach its own factual conclusions after re-evaluating the newly-discovered evidence in the context of the trial evidence. *See* C.P.L. § 470.15(1); *see also People v. Bleakley*, 69 N.Y.2d 490, 495 (1987).

B. Canellas Was the Prosecution's Indispensable Witness at Trial 1.

On March 3, 2014, Canellas appeared before the Hon. Michael Obus.[27] He pleaded guilty, pursuant to his cooperation agreement with the prosecution, to a one-count indictment charging him with grand larceny in the second degree (a class "C" felony). A.211-13. The charge alleged that, between December 2009 and April 16, 2010, Canellas stole at least $50,000 from an insurer who had invested in Dewey's private placement. A.211-13. In the eyes of the prosecution and the trial court, it was *the exact same conduct* that Sanders was charged in the Grand Larceny counts. A.257.1-257.13.

As with his testimony to the grand jury, A.851-54, Canellas did not believe he had acted wrongfully or with a criminal state of mind while working at Dewey, but capitulated to pressure and pleaded guilty to grand larceny in the second degree to avoid trial and potential imprisonment if convicted, A.856-860, 864-67, 870, 893-94. During Canellas' March 3, 2014 plea hearing, Justice Obus accepted Canellas'

[27] The trial judge recused himself from adjudicating Canellas' case and transferred the matter to another judge. *See* A.1135.2-1135.3

allocution, determined that Canellas was provident to plead guilty to the charge and found there to be a sufficient factual basis for accepting his plea.

During Trial 1, Canellas testified for more than 5 days, including about the Grand Larceny scheme. *See, e.g.*, A.799-800, 803-829, 832-850. Canellas conceded on cross examination that he previously testified to the grand jury that he did not believe he had acted wrongfully or with a criminal state of mind while working at Dewey. A.851-54. Canellas, however, as promised in connection with his guilty plea, was required to provide favorable testimony for the prosecution. Despite Canellas' testimony and his guilty plea for Grand Larceny, Sanders was acquitted of Grand Larceny. A.1043.

C. Canellas Was Permitted to Renegotiate His Plea and Cooperation Agreement After Sanders Was Acquitted of Grand Larceny and After Learning of Davis' DPA.

Following the trial court's dismissal with prejudice of the Grand Larceny counts against Sanders in February 2016, and learning of the Davis DPA, Canellas demanded, and the prosecution acceded, to withdrawing his guilty plea to grand larceny, renegotiating his plea and cooperation agreement, and pleading guilty to a less serious charge of "scheme to defraud" on the condition that Canellas agree, once again, to testify against Sanders during Trial 2. A.250-54. The new charge alleged that Canellas schemed to provide inaccurate statements to banks to secure funding for Dewey. A.255-57. Pursuant to the renegotiated plea and cooperation agreement,

the prosecution agreed to recommend a term of imprisonment of one to three years – *half* the term of imprisonment contemplated by the original plea and cooperation agreement, A.252, in exchange for his agreement to testify as the prosecution directed against Sanders at Trial 2. On October 11, 2016, Canellas appeared before Justice Obus on his "renegotiated" plea and cooperation, which the court accepted. A.237-49.

D. Canellas Provided False Testimony at Trial 2, Which He Later Recanted.

At Trial 2, the prosecution proceeded against only Sanders and DiCarmine. The trial court underscored the significance of the "criminal intent" element by imputing that the "guts of the [trial]" and "central issue in the case" was whether the defendants' statements or omissions were "deliberate" (*i.e.*, intentional). A.1128; A.1175-76 (the "ultimate question in this case" is "did you believe this was true or false when you made [an accounting] entry . . . ."). The prosecution agreed on the record while discussing these same evidentiary rulings. A.1128 ("[t]here will be lots of evidence to that effect," that "these [financial] statement were . . . deliberately misstated," "which is the heart of the case").

Canellas testified as the prosecution's star witness for 5 days. In its summation alone, the prosecution referred to Canellas *over two hundred times*, underscoring the prosecution's belief in the indispensability of his testimony. In particular, Canellas testified that the accounting entries were illegitimate, false or

intentionally wrong, and that Dewey's financial statements were not just misrepresented, but *deliberately misrepresented*, suggesting, therefore, an intent to deceive. *See, e.g.*, A.1178-80.

Despite the scores of Dewey employees who felt pressure to testify against Sanders in exchange for more lenient treatment, not one witness—other than Canellas—testified that Sanders' had the requisite criminal intent for a jury to convict beyond a reasonable doubt on the charged offenses. The prosecution underscored this fact by arguing that Canellas was the linchpin of the evidence regarding Sanders' state of mind. *See* A.1376-77. The trial court further underscored the significance of the "criminal intent" element that was the centerpiece of Canellas' testimony. *See* A.1379; *see also* A.1380-82. The trial judge's specific jury charge regarding each count in the Indictment reiterated that intent to defraud is a critical element that must be proven beyond a reasonable doubt. A.1381 (Scheme to Defraud); A.1385 (Martin Act); A.1386-87 (Conspiracy). Although acquitting DiCarmine, the jury convicted Sanders.

In September 2017, nearly 4 months after Sanders' conviction, Canellas sent an email to Nicholas C. Jelf, Dewey's former Director of Human Resources, requesting a letter of support on sentencing in his effort to avoid prison. Jelf remarked how he believed no one—neither Sanders nor Canellas—acted with criminal intent; however, because he already provided a letter of support for

Sanders, Jelf declined to submit a similar letter on Canellas' behalf. Unsolicited, Canellas responded, in pertinent part: ***"There was never any criminal intent. No one was thinking they were breaking the law. . . [N]o one had bad intentions. No one did anything they though[t] would cause harm to others."*** A.288-92.

Canellas' statement in and of itself—untainted by any self-serving motivation[28]—calls into question the entirety of his Trial 2 testimony regarding the critical element of Sanders' alleged criminal intent. Canellas, whose sentencing hearing was scheduled to proceed on October 27, 2017, 17 days after Sanders' sentencing hearing, <u>never</u> once considered revealing to the trial court or Sanders his belief that neither he nor Sanders acted with criminal intent. Doing so would have potentially jeopardized Canellas' ability to receive the benefit of his plea arrangement with the prosecution..

E. The Trial Court Erred When It Failed to Fully Consider Sanders' <u>New Evidence and Denied His Motion to Vacate Conviction</u>.

On March 16, 2018, the trial court denied Sanders' motion to vacate the judgment of conviction pursuant to C.P.L. §§ 440.10(1)(g), (h), and (4). The trial court held that although the Canellas email was created after the trial this evidence was "cumulative to, and in fact consistent with, Canellas' testimony in both the

[28] It cannot even be said that Canellas was motivated by self-serving interests in order to obtain a letter in support of his impending sentencing hearing since, in the immediately preceding email thread, Jelf declined to provide a letter in support. *See* A.288-92.

second and first trials." A.28-34. The trial court further held that Sanders had not advanced sufficient evidence to overcome his burden of proof and that a hearing was not required, because the proffered evidence "does not make out a *prima facie* showing of actual innocence or raise serious doubt about the defendant's guilt as to warrant further exploration by the Court." A.28-34.

Section 440.10(1)(g) of the Criminal Procedure Law provides that newly-discovered evidence is that which "has been discovered since [the verdict and] . . . could not have been produced by the defendant at trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at trial the verdict would have been different. . . ." N.Y. Crim. Proc. Law § 440.10(1)(g). Courts have held that, to satisfy the statute, the proffered evidence must meet six criteria: (1) be of such a nature that it would probably change the result of a new trial; (2) have been discovered since the trial; (3) have been undiscoverable before or during trial, even with due diligence; (4) be material; (5) be non-cumulative; and (6) not merely impeach or contradict evidence given at trial. *See People v. Salemi*, 309 N.Y. 208, 216 (1955); *People v. Taylor*, 246 A.D.2d 410, 411 (1st Dep't 1998). The newly-discovered evidence meets this criteria.

1. <u>Sanders Raised the Canellas Recantation Email in a Timely and Diligent Manner</u>.

There can be no doubt that Sanders exercised due diligence in discovering this evidence and bringing it to the trial court's attention. As previously indicated,

although Canellas emailed Jelf in late August 2017, and then transmitted the recantation email in early September, this new evidence was not disclosed and provided to Sanders and his counsel until after Sanders' October 10, 2017 sentencing hearing. A.293-94. Thereafter, counsel attempted to confirm the authenticity of the email, and obtain an affidavit from Jelf, which occurred on October 31, 2017. A.288-92. Thus, the new evidence was timely presented.

2. The Canellas Recantation Email Is Not Collateral or Cumulative.

When newly-discovered evidence goes to the heart of a defendant's trial defense, it cannot be viewed as collateral or cumulative. *See People v. Santos*, 306 A.D.2d 197, 198 (1st Dep't 2003). New York courts have reasoned that credible recantation evidence can be sufficient to overturn a verdict. *See, e.g.*, *People v. Deacon*, 96 A.D.3d 965, 969 (2d Dep't 2012); *People v. Tankleff*, 49 A.D.3d 160, 182 (2d Dep't 2007); *People v. Morillo*, 35 Misc. 3d 1213(A), 2011 N.Y. Slip Op. 52507(U), *17 (Sup. Ct. Bronx Cty., 2011); *Wong*, 11 A.D.3d at 726.

Here, the trial court determined that the Canellas email did not constitute a recantation, failing to meaningfully assess that, as in *Tankleff*, the evidence recanted was the "linchpin" of the prosecution's case. A.293, 1376-77. The Canellas email negates and disproves an element of criminal intent essential to all three charged offenses on which Sanders was convicted. It also reaffirms substantively that Canellas and others had no criminal intent. At Trials 1 and 2, such testimony was

colored by forced admissions by Canellas that either he had lied to prosecutors initially about having no criminal intent, or had been mistaken and, therefore, accepted the prosecution's "truth" that he indeed had the requisite criminal intent. Canellas' prior statements to the prosecution about having no criminal intent merely gave the defense impeachment evidence to use at Trial 2 as an inconsistent statement. That Canellas at Trial 2 always reaffirmed the prosecution's narrative that he intended the criminal conduct he and Sanders were charged with tainted how the jury viewed and processed this evidence. Yet, long after conclusion of Trial 2, Canellas, in an entirely unsolicited manner, confirmed that neither he nor anyone else had criminal intent to commit the charged acts.

As such, had Canellas been free to testify his conscious at Trial 2 about the lack of criminal intent, deny the prosecution's accusations of intentional misconduct without retribution, a verdict more favorable to Sanders would have been probable—contrary to the conclusory finding in the trial court's Order. A.28-34. As the prosecution conceded, aside from Canellas' trial testimony, no other significant evidence established Sanders' criminal intent. A.293, 1376-77.

The trial court's Order is erroneous because it rests on an incorrect finding that the Canellas Recantation email is: (1) cumulative of the trial testimony; and (2) undermined by "ample compelling evidence" supporting Sanders' conviction. A.31-32, 293. Yet, the Order is devoid of any assessment of the Canellas email in the

context of this allegedly "compelling" trial evidence, let alone the broader nature of this case, which included a mistrial in Trial 1, followed by a pronouncement by the trial court that no rational juror could find that Sanders acted with larcenous intent based largely on Canellas' testimony at that trial. A.228, 293.

Indeed, the trial court failed to comment at all on that issue, and failed to identify which trial witnesses, other than Canellas, supposedly provided testimony probative of Sanders' intent to defraud. Moreover, there is not "ample" *competent* evidence of criminal culpability. The verdict was therefore against the weight of the competent evidence introduced at Trial 2.

3. The Canellas Recantation Email is Newly Discovered Evidence and Could Not Have Been Discovered Prior to Trial 2.

The Canellas Recantation email is clearly newly discovered. It postdates the start of Sanders' trial by over six months and postdates Sanders' conviction by nearly four months. *See Morillo*, 35 Misc. 3d 1213(A) at *17 n.17 (post-trial recantation found "without question" to constitute "new evidence" under C.P.L. § 440.10(1)(g) that "clearly . . . could not have been discovered before trial with due diligence."); *see also Wong*, 11 A.D.3d at 725. Indeed, Canellas' post-trial recantation, by definition, would not have been available for use as evidence during Sanders' trial.

Canellas' testimony, on a linear plane, began during the grand jury investigation with a denial of wrongdoing, including a denial of criminal intent. *See* A.97.1. As Canellas progressed along this spectrum temporally closer to Trials 1

and 2, Canellas' testimony more closely aligned with the prosecution's trial narrative. Canellas then conceded at Trial 2 that he either lied initially or was in denial about the criminal nature of his actions at Dewey. *See* A.1205.1, 1230.2. Canellas even pleaded guilty – twice – to such conduct. He explained the prior inconsistency. But, at no time did Canellas ever return to his prior position of having no criminal intent . . . *until his recantation email*.

F. The Canellas Recantation Email Supports Sanders' Claim of Actual Innocence.

Under C.P.L. § 440.10(1)(h), a ground for vacating a judgment includes circumstances in which "[t]he judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States." Further, Judiciary Law § 2-b[3] permits the court to devise new processes where fairness so requires, and thus provides an alternative mechanism for the court to remedy the injustice of a wrongful conviction.

Sanders has maintained his innocence throughout the entire, arduous and painful investigation and two trials of exceptional length. Sanders refused, despite the prosecution's tactics, to enter a plea of guilty or even *nolo contendere*. Sanders instead chose to fight the prosecution's charges, and the outcome of Trial 1 vindicated that position. Leading up to Trial 2, Sanders' resolve about his innocence never wavered. Canellas' recantation, when coupled with the lack of any

corroborating witness testimony about criminal intent, supports Sanders' claim of actual innocence under both the federal and state constitutions.

Canellas' exhaustive testimony throughout Trial 2 regarding Sanders' criminal intent should be rejected in light of his recantation. No witness other than Canellas provided the prosecution with testimony of Sanders' alleged criminal intent. On the contrary, Canellas' recantation is corroborated by Cascino's testimony that even she did not believe anything criminal or improper was occurring at the time, and that any direction she received came from Canellas, not Sanders. A.905, 1232, 1238, 1241-42. Thus, absent Canellas' contrived testimony that evolved over time to align with the prosecution's narrative of criminal intent, the prosecution had no evidence of criminal intent.

The Canellas email was not consistent with his Trial 2 testimony. On a testimonial spectrum, Canellas disavowed any criminal intent *before* he evolved his testimony under threat of prosecution before Trial 1 and again, at Trial 2. His Trial 2 testimony reflected his "awakening", affording Canellas the opportunity to abandon his early denials. The jury did not hear Canellas at any time reaffirm his pre-Trial 1 denials. His recantation, however, came *after* the weight of an impending prosecution and potentially lengthy sentence was lifted, and the motivation to shade the truth or provide incorrect and inaccurate information subsided.

A reasonable juror would be compelled to find reasonable doubt as to the commission of any criminal activity. Accordingly, Sanders' conviction should be reversed, vacated and the charging instrument dismissed for actual innocence.

XIV. THE TRIAL COURT ERRED WHEN IT DENIED SANDERS' MOTION TO RENEW HIS MOTION TO DISMISS THE MARTIN ACT VIOLATION COUNT AND, AS A RESULT OF PREJUDICIAL SPILLOVER, THE REMAINING COUNTS IN THE INDICTMENT.

On June 12, 2018, the New York Court of Appeals ruled that violations of the Martin Act are subject to a three-year statute of limitations under C.P.L.R. § 214(2), rather than the six-year statute of limitations previously espoused by the prosecution under C.P.L.R. §§ 213(1) or 213(8) applicable to an "action based upon fraud." In *People v. Credit Suisse Secs. (USA) LLC*, the Court of Appeals' decision served to narrow the reach of the Martin Act, widely considered the most expansive state securities law in the United States. 31 N.Y.3d 622, 632-33 (2018). By its terms, the three-year statute of limitations also applies to criminal Martin Act violations. The prosecution of Sanders for violating the Martin Act more than three years after the charged conduct occurred was untimely.[29] Because the prosecution of that count

[29] The change in law under *Credit Suisse* would apply retroactively to Sanders' case on direct appeal and its implications on Sanders' substantial and constitutional rights. In New York, courts look to three factors in order to determine whether new precedent operates retroactively: (1) "the purpose to be served by the new standard;" (2) "the extent of the reliance by law enforcement authorities on the old standard;" and (3) the effect on the administration of justice of a retroactive application of the new standard." *Policano v. Herbert*, 7 N.Y.3d 588, 603 (2006) (citing *People v. Pepper*, 53 N.Y.2d 213, 220 (1981). Under the first prong "'current constitutional

had a prejudicial spillover to the Scheme to Defraud and Conspiracy counts, Sanders' conviction of all charges at Trial 2 must be reversed, vacated and the charging instrument dismissed with prejudice.

A. The *Credit Suisse* Decision Established That Martin Act Enforcement Matters Are Subject To A Three-Year Statute of Limitations.

The State has long taken the position that the Martin Act statute of limitations period was six years under C.P.L.R. §§ 213(1) or 213(8), not a shorter period under C.P.L.R. § 214(2). *See, e.g.*, *Credit Suisse*, 31 N.Y. 3d at 627-28. In *Credit Suisse*, the New York Court of Appeals rejected the Attorney General's position and reversed a divided First Department panel decision. In doing so, it held for the first time that a three-year, not six-year, statute of limitations under C.P.L.R. § 214(2) applied to Martin Act violations, noting the broader sweep of the Martin Act as compared with common law fraud.[30] *Id.* at 632. Consistent with the express

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standards that go to the heart of a reliable determination of guilt or innocence' will be applied retroactively, but 'decisions which are only collateral to or relatively far removed from the fact-finding process at trial' apply prospectively only.'" *People v. Baret*, 23 N.Y.3d 777, 799, 800 (2014). The second and third prongs, are only of substantial significance when the answer to the retroactivity question is not found in the purpose of the new rule itself. *People v. Donovan*, 107 A.D.2d 433, 440 (2d Dep't 1985).

[30] The Court of Appeals observed that there is no provision expressly stating the applicable statute of limitations for Martin Act violations and, despite being nearly a century old, the Court had never had occasion to consider the issue prior to *Credit Suisse*. 31 N.Y.3d at 630.

language of C.P.L.R. § 2221(e), the *Credit Suisse* decision constitutes a change in the law (or new and dispositive interpretation of existing law) that would not only change the prior determination, but would have rendered a prosecution of the Martin Act count impermissible at the outset.

That the *Credit Suisse* decision turned on a civil enforcement action under the Martin Act does not preclude its application to Sanders' criminal case. First, while the statute of which Sanders was convicted—N.Y. G.B.L. § 352(c)(5)—includes no express statute of limitations, *Credit Suisse* left open the door to using C.P.L.R. § 214(2)'s three-year period as a gap filler, as reflected in Judge Feinman's concurring opinion. *See Credit Suisse*, 31 N.Y.3d at 634, n1 (Feinman J., concurring).

The Martin Act expressly states that the "the provisions of the [C.P.L.R.] ***shall apply to all actions*** brought under th[e statute] . . . ." N.Y. G.B.L. § 357 (emphasis added). Judge Feinman's opinion reflects a recognition that, although the facts of the *Credit Suisse* case limited its purview to the civil enforcement context, the Martin Act applies to criminal as well as civil enforcement. *See* N.Y. G.B.L. § 357. No surprise, then, that the Court in *Credit Suisse* extensively discussed the history of the *criminal* provision of the Martin Act, including how its broad definition of "fraudulent practices" includes liabilities not cognizable under common law fraud. 31 N.Y.3d at 636-44 (discussing N.Y. G.B.L. § 352). This discussion would have

been unnecessary if a five-year (or six-year) statute of limitations applied to criminal Martin Act claims.

Moreover, the *Credit Suisse* decision is sufficiently expansive in its review, interpretation of the applicable statute of limitations provision, and reasoning to apply to Sanders' case—and all criminal Martin Act convictions—notwithstanding the trial court's perfunctory order. An interpretation that a statute of limitations applies to limit the government's ability to pursue *civil* action against a defendant would most assuredly apply with equal or greater force in the criminal context. It is well settled that a "statute of limitations reflects the Legislature's judgment as to when a charge becomes too stale to prosecute based largely on three considerations: (1) the defendant's difficulty in mounting a defense when facts might have become obscured by the passage of time; (2) the inadvisability of punishing offenders for ancient acts; and (3) the need to encourage law enforcement to investigate criminal activity promptly." *People v. Minott*, 41 Misc. 3d 1002, 1005, 2013 N.Y. Slip Op. 23334 (Crim. Ct., N.Y. Cty. October 3, 2013) (quoting *People v. Seda*, 93 N.Y.2d 307, 311 (1999).) Further, "[c]onsistent with their legislative purpose, criminal statutes of limitations are to be 'liberally construed in favor of the defendant,' that is, 'in favor of repose.'" *Id.* (quoting *People v. McAllister*, 77 Misc. 2d 142, 144 (Crim. Ct., Kings. Cty. 1974)).

B. The Trial Court Erred in Denying Sanders' Motion to Renew Under C.P.L.R. § 2221 Based on a Material Change In Law.

C.P.L.R. § 2221(e)(2) permits a party to file a motion for leave to renew a prior motion to dismiss when "there has been a change in law that would change the prior determination." *See Dinallo v. DAL*, 60 A.D.3d 620 (2d Dep't 2009) (citing C.P.L.R. § 2221(e)(2)). This provision applies to criminal actions because there is "no applicable provision[] in the CPL concerning the issue at hand," and, as such, "those provisions of the CPLR which do address the issue may, and should, be applied . . . ." *See, e.g.*, *People v. Lawrence*, 38 Misc. 3d 1204(A), 2012 N.Y. Slip Op. 52366(U), *2 (Sup. Ct. Bronx Cty. Dec. 26, 2012). The trial court's denial of a motion to renew pursuant to C.P.L.R. is reviewed for an abuse of discretion. *Johnson v. State*, 95 A.D.3d 1455, 1456 (3d Dep't 2012); *see also Barnes v. State*, 159 A.D.2d 753, 754 (3d Dep't 1990).

For purposes of this case, a motion for leave to renew a motion to dismiss pursuant to C.P.L.R. § 2221(e) must demonstrate that there has been a change in the law that would change the prior determination, and reasonably justify the inability of the defendant to present such facts or change in law in the prior motion to dismiss. *See People v. De Jesus*, 34 Misc. 3d 748, 753, 2011 N.Y. Slip Op. 21414 (Sup. Ct. N.Y. Cty. 2011). Accordingly, the Martin Act count was time barred at the time of Sanders' indictment. Sanders' constitutional rights were violated by the prosecution of an untimely Martin Act charge and must be reversed and vacated.

1. Sanders' Prosecution for a Martin Act Violation Was Untimely.

Count 105 of the Indictment alleged Sanders violated the Martin Act, N.Y. G.B.L. § 352(c)(5) for conduct purported to have occurred "in or about late December, 2009 to on or about April 16, 2010". A.88. At the time of Trials 1 and 2, the trial court and the prosecution construed the Martin Act count as governed by either a six-year statute of limitations, or five years under C.P.L. § 30.10(2)(b). As charged in the Indictment, the last act underlying the Martin Act violation occurred on April 16, 2010. Even construing the facts in a light most favorable to the prosecution, in order to be timely, the prosecution should have charged Sanders with a violation of the Martin Act by no later than April 15, 2013. Instead, the prosecution waited until March 6, 2014, to indict Sanders.

2. The Trial Court's Ruling Denying Relief Ignores and/or Misinterprets the Reasoning of *Credit Suisse*.

Ignoring much of Sanders' motion, the trial court reasoned only that criminal Martin Act cases are governed by C.P.L. § 30.10(2)(b), a statutory provision providing a catch-all five-year limitations period for all felonies, "with the exception of certain specifically enumerated felonies, which have no statute of limitations . . ."[31] A.746.5. The Court of Appeals, however, left open the prospect that the three-

[31] While the trial court did not elaborate in the Order, it was presumably referring to C.P.L. § 30.10(2)(a), which provides that certain sexual abuse crimes under the Penal Law "may be commenced at any time." C.P.L. § 30.10(2)(a). But, the trial court failed to recognize that certain criminal actions authorized under the General

year limitations period may be applicable to criminal Martin Act charges. If criminal Martin Act convictions were so assuredly governed by C.P.L. § 30.10(2)(b)'s five-year statute of limitations, as the trial court suggested in its order, Judge Feinman's observation would have been unnecessary and even illogical. But, it is quite clear that Judge Feinman's footnote in his concurring opinion acknowledged that, while not apposite to the specific factual backdrop in *Credit Suisse*, the application of a shortened limitations period in the criminal context was not a settled issue and would need to be addressed. The correct limitations period was three years and began to run on April 16, 2010, the date of completion of the entire course of conduct. As such, the Martin Act charge was untimely when included in the indictment, and when pursued at Trials 1 and 2, and should never have been brought. Sanders' Martin Act conviction must be vacated and that count dismissed.

C. The Trial Court Further Erred in Denying Sanders' Motion to Vacate the Conviction Under C.P.L. § 440.10(1)(a) and (1)(h) as The Trial Court Lacked Jurisdiction and the Conviction Was Obtained in Violation of Sanders' Constitutional Rights.

Sanders' Motion further sought to vacate his conviction on two additional grounds—both of which the trial court failed to meaningfully assess. C.P.L. § 440.10(1)(a) provides that a conviction may be vacated upon showing that the trial

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Business Law, including other Class E felonies, are often governed by shorter statutes of limitations than those found in C.P.L. § 30.10(2)(b). *See, e.g.*, N.Y. G.B.L. § 341 (3 year statute of limitation for criminal Donnelly Act violations).

court did not have jurisdiction of the action. C.P.L. § 440.10(1)(h) further provides that a judgment of conviction may be vacated if obtained in violation of a defendant's constitutional rights.

The trial court lacks subject matter jurisdiction over a claim that is statutorily time-barred. *See, e.g.*, *Robbins v. Forgash*, No. 13-0624 (NLH/JS), 2014 WL 12588683, at *4 n.4 (D.N.J. July 31, 2014) ("Because plaintiffs' suit is time-barred, this Court lacks subject matter jurisdiction."); *Price v. Fugate*, No. A–15–CV–00185–LY–ML, 2015 WL 3971273, at *2 (W.D. Tex. June 30, 2015). It is axiomatic that being charged with a time-barred crime and subjecting an individual to prosecution (not once, but twice) for a crime that is not properly before the court is a violation of that defendant's federal and state constitutional due process rights. Moreover, actually convicting and sentencing a defendant for a crime not properly before the trial court, thereby subjecting that defendant to loss of life, liberty, or property, is an egregious error of constitutional proportions and only can be remedied by immediately vacating the conviction and returning that individual to the status he would have enjoyed absent the baseless charge, prosecution and conviction.

Because applying a three-year limitations period under *Credit Suisse* would render the prosecution of Sanders under the Martin Act time-barred—and, by extension, shield him from conviction and sentencing—prosecution of this claim

violated Mr. Sanders' constitutional due process rights. Standing alone, they present grounds to vacate the judgment of conviction. Sanders' conviction for violating the Martin Act, therefore, must be reversed and vacated and the charging instrument dismissed with prejudice to avoid any further constitutional abuses.

D. The Prejudicial Spillover Resulting from Prosecution of the Martin Act Violation Compels Vacating Sanders' Convictions on the Remaining Counts.

This Court should reverse the trial court in the interest of justice. *See* C.P.L. § 470.15(3)(c). The impact of the wrongful and untimely prosecution of Sanders for the alleged Martin Act violation went far beyond the improper conviction of that count; it tainted the entirety of Trial 2, painting Sanders in a negative light, and forced him to defend a claim he would not have had to defend had he been prosecuted today. As with the other arguments in Sanders' Motions, the trial court provided nearly no explanation for failing to vacate the Martin Act conviction on this basis. Nor could it.

Courts have recognized the prejudicial and irreversible "spillover" effect that a wrongful prosecution of one count can have on the remaining counts and the trial as a whole as grounds for vacating the convictions on remaining counts. In analyzing the potential impact, the New York Court of Appeals has defined the standard as requiring reversal if "there is a "reasonable probability' that the jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in

a 'meaningful way'. . . ." *People v. Doshi*, 93 N.Y.2d 499, 505 (1999) (quoting *People v. Baghai-Kermani*, 84 N.Y.2d 525, 532 (1994). In *Doshi*, the Court of Appeals ultimately concluded that the "tainted counts are readily distinguishable from the remaining counts upon which defendant was convicted." *Id.* Here, in contrast, the Martin Act claim and underlying facts were subsumed within, or integral components of, the remaining charges of Scheme to Defraud and Conspiracy. The Indictment makes this clear, and the prosecution's own opening statements and closing arguments reinforces this position.

When determining whether prosecution of a reversed claim resulted in prejudicial spillover, courts typically look to whether the reversed count is temporally or factually related to any remaining counts. Prejudicial spillover also may exist where the government sought during trial to weave the reversed count and remaining counts into a single narrative that the defendant allegedly engaged in a pattern of criminal activity over a period of time. *See People v. Castillo*, 47 N.Y.2d 270, 275 (1979).

Although courts typically examine the strength of the evidence against the defendant on the remaining counts in determining whether to vacate or affirm a conviction, a presumption favors the defendant. *See United States v. Pelullo*, 14 F.3d 881, 900 (3d Cir. 1994). In cases where, as here, the prejudicial spillover resulted from constitutional errors, courts apply a standard of harmless beyond a

reasonable doubt. *See Klein v. Harris*, 667 F.2d 274, 290-291 (2d Cir. 1981); *Pacelli v. United States*, 588 F.2d 360, 364-65 (2nd Cir. 1978), *cert. denied*, 441 U.S. 908 (1979). In other words, unless it is "highly probable" that the spillover evidence "did *not* prejudice the jury's verdict," a new trial is required. *United States v. Cross*, 308 F.3d 308, 317 (3d Cir. 2002) (emphasis added); *People v. Morales*, 20 N.Y.3d 240 (2012) (holding spillover effect of tainted charge required reversal).

Here, notwithstanding the Trial 1 acquittals, the trial court permitted the prosecution to introduce evidence of the acquitted Grand Larceny counts at Trial 2. The Martin Act violation was squarely predicated on the separately charged Grand Larceny conduct in Counts 2-14, which alleged Sanders defrauded insurance companies in connection with a $150 million private placement of securities. Although the Scheme to Defraud and Conspiracy counts also were predicated on the Grand Larceny counts, prosecuting the Martin Act violation allowed the prosecution to reinforce Sanders' alleged larcenous conduct artificially compounding his criminal culpability while adding a dimension of securities fraud to inflame the jury and prejudice Sanders. It is utterly implausible that evidence necessary to prove the improper Martin Act count did not supplement deficiencies in the proof on key elements of the Scheme to Defraud and Conspiracy counts. The evidence presented in support of the impermissible Martin Act count pejoratively branded Sanders by

creating a perception that he had a propensity to commit a crime and is deserving of punishment for something.

Additionally, prosecuting Sanders for a Martin Act violation where the underlying acts supporting the charge were time-barred constituted error of constitutional proportions, thereby triggering the exacting standard of harmless beyond a reasonable doubt. The New York Court of Appeals' interpretation of the appropriate statute of limitations for Martin Act violations is not a mere procedural change in the law, but rather implicates Sanders' constitutional due process rights. Given the prosecution's consistent theory throughout Trial 2 regarding Sanders' involvement in a widespread scheme and conspiracy to defraud investors and banks, the prosecution cannot under any circumstances establish such error was harmless beyond a reasonable doubt.

For the foregoing reasons, the trial court erred in denying Sanders' Motion to Renew the Motion for Dismissal and the Alternative Motion to Vacate. The prosecution's failure to charge Sanders within the three-year limitations period compels this Court to reverse and vacate the Martin Act conviction under C.P.L.R. § 2221(e) as well as under C.P.L. § 440.10. Moreover, because of the patent prejudicial spillover taint that prosecution and conviction on a time-barred claim created—an error of constitutional proportions—the Scheme to Defraud and Conspiracy convictions should be reversed and vacated as well.

CONCLUSION

Based on the foregoing, Sanders respectfully requests that his conviction on all counts be reversed and vacated, and the indictment be dismissed with prejudice.

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Respectfully Submitted

DLA PIPER LLP (US)

Jessica A. Masella, Esq.
1251 Avenue of the Americas, 27th Floor
New York, New York 10020
Tel. (212) 335-4500
jessica.masella@dlapiper.com

Christopher G. Oprison, Esq.
200 South Biscayne Blvd., Suite 2500
Miami, Florida 33131
Tel. (305) 423-8522
chris.oprison@dlapiper.com
(*of the Bar of the State of Florida, State of Texas, the District of Columbia, and the Commonwealth of Virginia) by permission of the Court*

– and –

Janelly Crespo, Esq.
200 South Biscayne Blvd., Suite 2500
Miami, Florida 33131
Tel. (305) 423-8502
janelly.crespo@dlapiper.com
(*of the Bar of the State of Florida*) *by permission of the Court*

Attorneys for Defendant-Appellant Joel Sanders

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I, Christopher Oprison, attorney for the Defendant-Appellant, hereby certify that this brief is in compliance with 22 NYCRR § 600.10(d)(1)(v). The brief was prepared using Microsoft Word 2016. The typeface is Times New Roman. The main body of the brief is in 14 point. Footnotes and Point Headings are in compliance with § 600.10(d)(1)(i). On July 8, 2019, the Court approved Defendant-Appellant's request to submit an oversized brief up to 150 pages. The foregoing brief is 147 pages long and contains 37,469 words counted by the word processing program.

Dated: August 5, 2019

STATEMENT PURSUANT TO CPLR 5531

New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

against

JOEL SANDERS,

Defendant-Appellant.

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1. The indictment number of the case in the Court below is 773/14.
2. The full names of the original parties are set forth above. There has been no change to the caption.
3. The action was commenced in the Supreme Court of the State of New York, County of New York, Criminal Term Part 72.
4. This action was commenced by the filing of a criminal indictment in March 2014.
5. The criminal prosecution against Defendant-Appellant Joel Sanders ("Sanders").
6. The appeal is taken by Sanders from a judgment of conviction rendered on May 8, 2017; from a decision and order of the Supreme Court of the State of New York, County of New York, Criminal Term Part 72, entered on March 16, 2018, denying Sanders' motion to vacate his conviction pursuant to C.P.L. § 440.10(1)(g)(h), and (4), and; from a decision and order of the Supreme Court entered on November 15, 2018, denying Sanders' motion to renew, under C.P.L.R. § 2221(e), his prior Motion to Dismiss pursuant to C.P.L. § 290.10(1).
7. This appeal is being perfected on the Appendix method.